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ABSTRACT

A compilation of papers presented at a 1976 workshop on the law in higher education includes: the law in higher education, issues and trends (Roderick Daane); tort liability of college and university faculty, administrators, and trustees (Annette R. Johnson, Stephen R. Ripps); faculty contracts, major concerns (Richard R. Perry); due process for students, converting legal mandates into workable institutional procedures (Virginia B. Nordby); components of the lawsuit (Stephen R. Ripps); and compliance with federal legislation relating to discsrimination on the basis of sex and race (Janet L. Wallin). (MSE)

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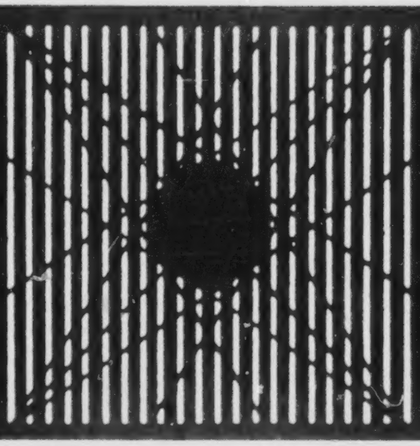

An Administrator's Overview

Vance T. Peterson, Editor

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Higher Education And The Law: An Administrator's Overview

Vance T. Peterson, Editor

Center for the Study of Higher Education
The University of Toledo
Toledo, Ohio

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PREFACE

The administration of colleges and universities just two or three decades ago was a rather low-key, relatively uncomplicated activity involving modest amounts of money and small staffs of administrative generalists. Today, by contrast, higher education administration is a highly complex function, typically involving significant amounts of money and large staffs of administrative specialists. Nearly all of the primary assumptions and procedures of administration have undergone significant change. One manifestation of this change is the degree to which college and university administrators are applying legal, as well as educational and economic, rationales to their activities. In terms of the law, administrators have come to realize that there is a considerable distance between the ingenuous dorm room searches of the early sixties, under color of *in loco parentis,* and the sophistication of due process and related guarantees of the mid-seventies under *Goss v. Lopez* and other cases.

The spectrum of legal issues with which college and university administrators today must deal is enormous, and growing. It runs the gamut from: torts, taxes, and title IX; to copyright, contracts, and compliance; to dismissal, due process, and duty. The domain is so large, often ambiguous, and increasingly specialized, that it has been called a "legal wilderness" by at least one observer.

The legal profession takes the present trends seriously enough to grant recognition to college and university attorneys as one of 17 specialty bars in the American Bar Association. Among many college administrators, however, the matter has received relatively little emphasis. It easily could be concluded that administrators either aren't troubled by the present trend or already know enough about the topic to ignore it at professional meetings and in most of their published observations and ruminations about the academic enterprise.

The present monograph assumes that neither of these suppositions is accurate. It is based on the notion that many administrators today are both deeply troubled by the recent encroachment of a multitude of legal proceedings in higher education and sufficiently ignorant about the developing case law, and their own liability and responsibilities regarding it, to require an overview of some significant highlights.

This volume represents a compilation of papers presented at a fall 1976 workshop on the law in higher education co-sponsored by the Center for the Study of Higher Education and the College of Law of The University of Toledo. A companion volume by Gerald P. Moran, *Private Colleges: The Federal Tax System and Its Impact* (1977), contains one additional paper prepared for the workshop which, due to its specialized focus and length, has been published separately.

The discussion begins with an overview of several issues and trends of significance in higher education today that bear on the legal rights and responsibilities of institutions and individual participants. The author, Roderick Daane, general counsel for the University of Michigan, offers some insightful speculations and poses several questions that suggest some of the existing "gray areas" in the law which courts, through litigation, and higher education institutions through policies and procedures, will be called on to clarify in the future.

A topic of considerable interest and concern to many faculty members, administrators, and trustees today is the question of whether they may be held personally liable for injuries suffered by students and employees. Annette R. Johnson and Stephen R. Ripps, the former an attorney and Bowling Green State University administrator, and the latter an attorney and professor of law at The University of Toledo, discuss the many elements involved in tort liability with which the major participants in academe should be familiar. They identify the major types of torts, discuss the meaning of and recent trends regarding sovereign and charitable immunity, and summarize the major impact cases involving torts by teachers, administrators, and trustees. The authors note that the courts today are far less reluctant to enter judgments in educational contexts compared to just a few years ago and predict that the trend will continue.

Another item of considerable importance to administrators, due to its potential for litigation if mishandled, is that of faculty contracts. Richard R. Perry, associate vice president for academic affairs at The University of Toledo and professor of higher education in the area of the law, outlines the primary elements involved in establishing contractual relationships with faculty and specifies several cautions to be observed in entering into or nullifying contracts. He describes who may legally enter into contracts on behalf of the institution, indicates what restrictions are appropriate regarding statements made during the hiring process, and reviews the major questions and issues relating to abrogating or modifying the employment contract.

Due process for students and the tension between legal mandates and workable institutional policies and procedures is the topic discussed by Virginia B. Nordby, attorney and policy coordinator at the University of Michigan. According to Ms. Nordby, the problem of implementing due process requires a clear separation of disciplinary and grievance procedures, and involves five additional elements: clarity about institutional purpose, care in stating the criteria by which conduct is to be judged, sensitivity in the choice of an individual or group to render a final decision, proper balance between formality/precision and simplicity/flexibility in specifying procedures, and care in designating the range of penalties or remedies available when making a final judgment. The author urges the development of policies and procedures that carefully balance legal, administrative, educational, political, and ethical considerations and offers suggestions for how to do it.

Many senior administrators and trustees who have been involved in lawsuits may never have fully understood the totality of the proceedings in which they became involved. Likewise, administrators being sued (or suing) for the first time may not have a very clear understanding about the major components of a lawsuit or the sequence of events. Stephen Ripps provides a useful "thumbnail sketch" of the lawsuit process. He begins with the purposes of a lawsuit, as distinguished from other types of proceedings, and defines each major stage of the procedure from the summons, complaint, and answer to the appeals.

The final paper by Janet L. Wallin, professor of law and law librarian at The University of Toledo, summarizes the federal laws and regulations involving discrimination and some recent cases relating to them. The author discusses the Equal Pay Act of 1963 (as amended), Titles II and VII of the 1964 Civil Rights Act, Title IX of the Education Amendments of 1972, and Executive Order 11246 (as amended). She briefly reviews the history of anti-discrimination legislation, clarifies the current status of these laws, and points out some of the major difficulties relating to their implementation.

A number of individuals, besides the authors represented, contributed their time and energies to make this publication a reality. The assistance of the following persons at various stages of conceptualization and development is gratefully acknowledged: Kathy L. Haefner, Patricia A. Hite, Annette R. Johnson, Sandra S. Keil, Michael Mowery, Robert J. Pearsall, Richard R. Perry, Stephen R. Ripps, Carol E. Roberts, Bobbi A. Weber, and Peter L. Wolff.

We believe that the papers included in this monograph will prove useful to administrators in both public and private institutions of higher learning and are pleased to make them available through the Center monograph series.

March 1977

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I

THE LAW IN HIGHER EDUCATION: ISSUES AND TRENDS

Roderick Daane

As a keynote speaker asked to comment upon issues and trends in higher education, I am in the enviable position of being permitted to raise questions and only guess at the answers. Keynoters, as I see it, are supposed to provide sort of a cosmic overview of the issues, leaving to those who follow the hard work of supplying you with information you can actually use. I intend to speculate a bit, but maybe you will get a nugget or two you can use as well.

TITLE IX

I'll start with a prediction about Title IX. By the time the dust settles (and I won't predict when that will be), Title IX will not apply to employment, thus eliminating one of two possible Federal agencies involved in administration of problems of sex-related employment discrimination. Our friends at EEOC will still be on hand, of course, but HEW will not.

Edging further out on the same limb, I'll venture that Title IX will ultimately apply only to actual *programs* receiving Federal dollars, not to all programs at an institution with some Federal aid. At the University of Michigan intercollegiate athletics is an example of a program thus beyond the reach of Title IX.

UNISEX BENEFITS

While I'm on the subject of sex, around the country there has been much attention paid to retirement plans which employ actuarial tables based upon greater life expectancy of females. Litigation testing the validity of plans which provide for equal contributions but smaller monthly retirement payments to females is pending in New York, Michigan, and elsewhere. Only two decisions have come down, to my knowledge (one from California, the other from Oregon), and both are on appeal. I shall not attempt to forecast the results in any of these cases, but I hope that either through case law development or otherwise, the option for colleges and universities of at least adopting a retirement plan that provides *either* equal contributions or equal periodic benefits will be preserved. The Equal Employment Opportunity Coordinating Council, a statutorily created Federal agency, has submitted to the President a report and recommendation concerning reconciliation of varying views of Federal agencies with respect to this so-called unisex issue.

SECURITY

Again, consistent with my mandate to speak about trends, you are all no doubt concerned about growing security problems and the legal liability of universities for failure to insure the physical safety of students and others on the campus. You may know that a Federal jury in Washington has ordered Catholic University to pay $20,000 to a female raped in a school gym at noon on a Saturday. The decision raises a question as to whether the University has strict liability for the preservation of physical safety for such invitees. As a practical matter, that one decision would so indicate. If it becomes a trend toward strict liability in this area it will of course have a profound effect upon all colleges and universities.

SUNSHINE LAWS

On September 13, 1976, Congress passed PL 94-409, the "Government in the Sunshine Act." The Act does not yet impose upon colleges and universities the duty of conducting their affairs in the sunshine as a precondition of access to the Federal purse, but as a practical matter, so many states are enacting, or have enacted, such legislation that it is a relatively new problem of general importance. Such legislation has as its altogether laudable goal insuring that all of the public's business be done "in public." It is an excellent illustration, however, of the principle that for every action there is an equal and opposite reaction, because the problems created by well-meaning attempts to solve the problem of secrecy are certainly numerous.

Florida's is, perhaps appropriately, the sunniest of the Sunshine Laws. There are virtually no exemptions or exceptions. Even the attorney/client privilege is gone. Even social meetings can be covered and required to be conducted in public.

Another illustration is the Supreme Court of Washington decision in *Cathcart* v *Anderson* in January 1975, in which it was held that the faculty meetings at the University of Washington Law School were open to students and the public. An apparently identical result was reached last July in a North Carolina trial court.

In Michigan the Governor has just signed Senate Bill 920, an Open Meetings Act, which will likely take effect on April 1, 1977. Among the threshold problems is to decide what "public bodies" are intended to be covered. If only the governing boards of the colleges and universities are required to conduct their affairs in the sunshine and to comply with the various notice, posting, minute-keeping and access requirements of the law, far less administrative burden is created than if the application of the Act is extended to the proliferation of faculty committees and such. Unfortunately, from the institutional standpoint, the definition of a public body in the Michigan law appears to be comprehensive enough to include many such university committees, such as school and college executive committees, departmental executive committees, and many others.

But not every "meeting" is a meeting which is required to be open. The only meetings which are open meetings are those in which a quorum is present for the purpose of "deliberating toward or rendering a decision on a *public policy*." We are currently researching the question of what constitutes a public policy for purposes of such legislation. Perhaps it can be argued that given the constitutional or other authority conferred upon the governing board of an institution, only that governing board is empowered to make public policy or to deliberate toward such a policy, and therefore only the meetings of such a board need be conducted in compliance with the Act. Such a restrictive interpretation is probably contrary to legislative history, most of which consists of high-sounding, politically attractive declarations to the effect that such statutes are to be given the broadest and most liberal interpretations.

Under the Michigan law, in the event that the meeting is one which is required to be open, anybody who wishes may attend and no conditions may be imposed, including registration or furnishing of one's name. Moreover, a person shall be permitted to address such a meeting, pursuant to rules adopted and recommended by the public body, and a person may not be excluded from the meeting except for a breach of the peace actually committed there. The Act does *not* apply, unlike some, to a chance or social meeting, provided that such a meeting was not designed to avoid the impact of the Act. How such subjective determinations are going to be made by the courts will be interesting to observe, and I am sure that there will be ample opportunity to do so, because, among the other provisions contained in the statute are those permitting individual plaintiffs to commence actions for injunctive relief, and civil penalties up to $500, plus court costs and attorney's fees.

There are some provisions for closing a meeting on a 2/3 roll call vote, but they are very limited. Illustrative is the provision which permits review of the specific contents of an *application* for employment when the candidate requests that such application remain confidential. That sounds okay, but the Act goes on to provide that all *interviews* by a public body for employment or appointment of a "public official" must be held in an open meeting. I don't know whether a faculty member will be considered a public official, but we have just undergone at the University of Michigan a successful search for a new financial vice president, and clearly the interviews of candidates by the Board of Regents would have been required to be public had the Act been in effect when the interviews were conducted. We may look forward to some real media events when next our University, or any other in Michigan, seeks a new president. Or it may be that none will apply!

The attorney/client privilege has been extensively curtailed in Michigan. I am permitted to advise my Board of Regents in private only concerning specific pending litigation and then only if an open meeting would have a "detrimental financial effect" on the litigating or settlement position of the University. The litigiously inclined will bring suit whenever such closed sessions are held, on the ground that an open meeting would not have had a detrimental financial effect on the University. The only way to defend that lawsuit would appear to be to reveal weaknesses in the case which was under discussion.

GOVERNING BOARD LIABILITY FOR INVESTMENT OF INSTITUTIONAL FUNDS

By now the *Sibley Hospital* doctrine has not only become well-known case law but has been codified by a number of states which have adopted the Uniform Investment of Institutional Funds Act. The Act, as did Judge Gesell in *Sibley*, makes it clear that trustees of colleges and universities are not derelict in their responsibilites simply because they delegate to employees of the institution investment authority over *institutional* funds. Similarly, the Act makes it clear that the actions of the trustees, in reviewing the performance of those to whom such delegations are made, are to be tested against the less rigorous standards applied to corporate directors rather than by the strict tests imposed upon the trustees of express trusts. There is, however, an exception which I believe will be of growing importance. Since the passage of the '69 Revenue Act more and more colleges and universities have become remaindermen of charitable remainder unitrusts, annuity trusts, and pooled income funds, devices whereby the donor or his designate remains entitled to an income for life or a term of years, before the university acquires its remainder interest. The point worth noting is that such charitable remainder trusts are *not* "institutional funds" as defined in the Uniform Act. The reason they are not is the interest of one or more third parties other than an institution. Therefore, as to such assets, the *Sibley* rule does not apply, and the trustees of your colleges or universities delegate at their peril authority to administer. Naturally, this is not a concern if the trustee is also a third party, such as a bank, but in the situation in which the institution is acting as trustee and remaindermen, the governing board should be cognizant of its potential liability, unprotected by the Uniform Act.

COPYRIGHTS

Another fairly pedestrian subject, with wide implications for colleges and universities, is copyright law. In October, 1976 the Congress passed the first comprehensive revision of the Federal Copyright Law since 1909. The issue of most importance to colleges and universities is of course the Fair Use Doctrine, with which the courts have grappled for years, notably in *Williams and Wilkens Co.* v *U.S.*, decided by the U.S. Supreme Court in November 1973, at which time the Court affirmed without written opinion the decision of the U.S. Court of Claims that the National Institutes of Health and the National Library of Medicine did not infringe a medical publisher's copyright, notwithstanding extensive photocopying and wide distribution of articles which appeared in the publisher's journals. The Fair Use Doctrine, as expressed in the law, will be significantly restricted. Some of the details are that a teacher will be allowed to make, for use in his professional work, a single copy of a chapter from a book, article from a periodical, a short story, short essay or short poem, a chart, graph, or the like from a periodical, book, or newspaper. Multiple copies of "brief" works for classroom use will also be permitted. "Brief" is defined in the case of prose as 2500 words of a complete article, or 1000 words or 10 percent of a longer work. No photocopying of consumable works, such as workbooks or standardized tests, is allowed, but periodicals can be copied by libraries free for inter-library loan use, up to six times a year. Periodicals more than five years old don't count. Other provisions will extend the copyright period from 28 years to 50 years after the death of the author, and require that public broadcasters pay for showing nondramatic musical or graphic works. The Act is something with which all of us must become thoroughly conversant and it obviously will cause changes in many well-settled practices.

FACULTY CONTRACTS

By now the Roth-Sindermann rules, with respect to termination of non-tenured and tenured faculty members, are well known to all of you. In case any of you haven't noticed, the last word on the subject was uttered by the U.S. Supreme Court last June when it decided *Bishop* v *Wood, et al.*, a case which arose when Patrolman Bishop was fired by the City of Marion, N.C., for reasons which were privately communicated to the plaintiff and which turned out to be false, at least for the purposes of the Court's review of respondents' motion for summary judgment. In a 5-4 decision, the U.S. Supremes disposed of the 14th Amendment property right issue on the basis that the city ordinance in question did not confer upon Patrolman Bishop any right of permanent employment. In so holding, the majority, speaking through Mr. Justice Stevens, conceded the possibility of an opposite construction of the ordinance, but accepted the view of the District Judge who, as Justice Stevens observed, had practiced law in North Carolina for a number of years and thus was an expert on the law of that state. The importance of the case, I think, derives not from the majority's somewhat cavalier treatment of the 14th Amendment property right issue, but rather from its view of the concomitant 14th Amendment deprivation of liberty issue. You will recall that the *Roth-Sindermann* rule provides that in the event a terminated employee's property *or* liberty rights are infringed, he is entitled to a pretermination hearing. The issue became then, whether Bishop's liberty had been restrined by the stigmatizing effects of being fired for, in essence, being a bad cop, when, on the record of plaintiff's own affidavit, he was in fact a very good cop. Plaintiff's allegations, tested on motions for summary judgment, must of course be taken as true, so the court had to decide whether a good cop had had his liberty restrained when he was fired for the privately communicated reason that he was a bad cop. The court held that he had not been constitutionally maltreated, because the communication, being private, had no stigmatizing effect. Justice Brennan took a contrary view in a vehement dissent, but the majority rule of *Bishop* is, as the court expressed it:

> The Federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public officials. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error.

I think that the best rule for a college or university to follow in terminating a non-tenured employee, if you can get away with it as a matter of policy, is still to give no reasons at all. *Roth-Sindermann* does not require them, but if reasons are given, even wrong reasons, the message of *Bishop* comes through pretty clearly — give them privately.

Another current faculty contract topic is of course financial exigency. Gary McBride and Richard Perry are going to discuss this issue, so I shall content myself with a short observation that the tough question which the courts have yet to authoritatively decide is who has the burden of proving the existence of a financial exigency. Since I am to comment upon trends, I venture the forecast that the courts will leave to the employer decisions as to the existence of a bona fide financial exigency justifying termination of tenured faculty; in other words, leaving to the terminated faculty member the chore of demonstrating the contrary.

Another sort of financial exigency problem that can arise involves not faculty but student contracts. What do you do if you find yourself in the position of Ferris State College, for example, which, pursuant to legislative mandate, established a

School of Optometry, accepted student applications for the following year, and then found, before the first student had matriculated, that through Executive veto it was without funds with which to provide the services it had agreed to offer? The specific issue at Ferris State, as I understand it, has been resolved without resort to the courts, but it may be a precursor of things to come as appropriations shrink and tax revenues become harder to collect.

Mandel v *HEW* is another illustration of financial troubles that can afflict colleges and universities which are dependent, in this case, on the Federal rather than the State government for funding. I am sure that all of you are familiar, at least in general terms, with the *Mandel* case, which was, in my opinion, a healthy reaction on the part of the State of Maryland to the egregiously overbearing action on the part of HEW and the Office of Civil Rights. The case is presently on appeal in the Fourth Circuit from a District Court decision which denounced in ringing terms the high-handed actions of the Federal government in threatening to withhold, without a shred of due process, funds which the University of Maryland, among others in that state, had been promised. The condensed facts are that in March 1969, OCR requested from Maryland a plan for eliminating racial segregation in higher education in the state. The state submitted two such plans by December 1970. No action was taken by OCR or HEW until March 1973. Notwithstanding the express requirement of Title VI and other applicable law, HEW adopted no regulations relating to the desegregation of state college systems, but suddenly, in March 1973, demanded further information, acknowledging that the 1970 plans had been neither accepted nor rejected in the past three years, and in May informed the state that it was not in compliance with Title VI and demanded within 20 days a revised plan. The state, understandably, asked HEW which requirements of Title VI it had failed to observe and for some citation of authority in support of HEW's position. HEW responded with a single citation which did not involve either Title VI or HEW. Meetings followed. The then Director of

OCR, Peter Holmes, steadfastly refused to provide guidelines. In June 1974, HEW accepted a Maryland plan, but in December, OCR sent a questionnaire containing over 100 questions, a response to which was required within 30 days. Responses were supplied, but in August 1975, OCR announced to the Governor that the state was failing to execute its plan promptly and vigorously, and demanded impossible responses within 30 to 90 days. More meetings. In November, Mr. Holmes quit as Director of OCR, and on December 15, 1975, the new Acting Director announced at a press conference that enforcement proceedings were to be taken against the State of Maryland, resulting in withdrawal of all Federal assistance to state colleges. On January 5, 1976, *Mandel* v *HEW* was filed in the Federal District Court. Chief Judge Northrup held that the actions of OCR, in failing to specify which programs were allegedly violative of nondiscrimination requirements, in threatening to cut off all aid to all state colleges and local community colleges, in failing to promulagate regulations as required by applicable statutes and rules, and in failing to participate in the voluntary compliance procedures required by statute, had violated important provisions of the Civil Rights Act of 1964 and other pertinent regulations designed to protect recipients of Federal grants from arbitrary Federal action.

Of course, I am far from the first to complain about this sort of trend on the part of government. Kingman Brewster published his celebrated statements on the coercive power of the Federal purse in 1975, and many other similar tributes to OCR can be found in the literature of higher education. It is a trend, which unchecked, would be fatally corrosive to the necessary autonomy of both private and public colleges and universities, and one can only hope that the Fourth Circuit will affirm Judge Northrup's decision in *Mandel* as an initial step in checking the growing substantive influence of the Federal dollar in higher education.

•

BANKRUPTCY

Another dollar issue about which there have been some relatively recent developments, is the effect upon student debts of postgraduation declarations of bankruptcy. There is again pending in the Congress a proposal to exclude educational debts from discharges in bankruptcy. Its fate is conjectural. In the meanwhile, colleges and universities continue to grapple with their collection problems by means which can be most charitably described as self-help, and typically consist of withholding transcripts and grades until debts are paid. For those who employ this device, a somewhat helpful decision came down on September 16, 1976, in the U.S. District Court for the Eastern District of Missouri, *Girardier* v *Webster College*. The district judge filed a memorandum opinion granting defendant's motion to dismiss for lack of subject matter jurisdiction, in the process concluding that although the district court has original jurisdiction on "all matters and proceedings in bankruptcy," the matter at hand (the defendant's refusal to issue plaintiff a transcript) was not a proceeding in bankruptcy, even though the purpose of defendant's refusal was to collect a previously discharged debt. The court stated that, "In the absence of the threat of some *judicial* enforcement procedure, this Court does not have durisdiction of plaintiffs' claim under 28 U.S.C. S1334." (Emphasis added.) Self-help being a *non*-judicial enforcement procedure, for those of you who are hardliners on the subject of such methods, this decision may be of some assistance. Do not count on it for help in a state court Mandamus or Injunction action, however.

THE FLSA and ELEVENTH AMENDMENT

I will be brief on these subjects because some members of the audience are from private colleges and universities, to which they are of little interest. For those of you who are interested in state colleges, however, there have been some relatively recent significant developments. Last June, the U.S. Supreme Court decided *Fitzpatrick* v *Bitzer*, which eliminated the 11th Amendment defense in Title VII cases. The 11th Amendment had previously, under the doctrine of *Edelman* v

Jordan, represented a bar to the collection of back pay or other monetary damages from a state university, although injunctive relief was always available in the Federal courts under the doctrine of ex parte *Young*. In reviewing the 11th Amendment defense in *Fitzpatrick*, the court seized upon the Fifth Clause of the 14th Amendment as authorization for the Congress to enact a back pay regulation and concluded that the Congress had in fact done so when it enacted Title VII, and that the 11th Amendment bar did not therefore apply.

The Fifth Circuit Court of Appeals has recently, on September 20, decided *Jagnandon* v *Giles*, involving an attack on a Mississippi statute that classified all alien students as nonresidents for tuition purposes. The court rejected the argument that the action was really a suit for equitable restitution rather than damages, and that such restitution should therefore be paid. Equally unsuccessful were the arguments that the 11th Amendment did not bar recovery for 14th Amendment violations. The court concluded, with *Fitzpatrick*, that the 11th Amendment may be effectively preempted by Congressional legislation enacted pursuant to the enforcement provisions of Section 5 of the 15th Amendment, but in the absence of such legislation, the 11th Amendment was held to prevail. From the standpoint of those of us who represent public institutions, the 11th Amendment, with its protection against retroactivity, is and has been an important defense tool in, among others, 1983 cases. It is eroding some, but nonetheless remains significant.

The FLSA was declared inapplicable to states last June by the U.S. Supreme Court in *National League of Cities* v *Usury*. It is worth noting, however, that the Equal Pay Act still applies, according to a half-dozen District Court cases which have come down since.

REVERSE DISCRIMINATION

You all know that Mr. Bakke has been successful in the respected California Supreme Court, which has held that the special admissions program of the University of California

Medical School at Davis was unconstitutional. The case is now headed for the U.S. Supreme Court. Mr. Bakke, unlike Marco DeFunis, was not admitted to the University of California Medical School, and therefore when the case reaches the Court, it will not be confronted with the mootness issue which it applied by way of avoiding a decision in *DeFunis*. The Bakke decision is one of what seems to be a growing number of court decisions disapproving so-called reverse discrimination plans.

An example is *Cramer* v *Virginia Commonwealth University*, decided last May by the U.S. District Court in Virginia, disapproving both sex *quotas and goals* on the basis neither was required by Title VI and both were constitutionally infirm absent a stronger showing of the need for "affirmative action" than was presented by the facts.

Still another is *Flanagan* v *Georgetown College*, decided on July 28 by the U.S. District Court for the District of Columbia. The court held that the law school's policy of allocating 60 percent of its scholarship funds to minority students who comprised only 11 percent of the class violated Title VI.

An authoritative opinion from the U.S. Supreme Court was much needed, even before *DeFunis*. With each new lower court decision, the need grows.

CONCLUSION

Maybe you have observed, as I did in preparing this talk, that there are some general themes pervasively present in most of the issues discussed. Money, or the short supply thereof, is at the root of the exigency question, some of the reverse discrimination cases, the Federal legislation cases like *Mandel*, and the unisex matters. The latter also involves that old favorite, sex. And then there is politics, most clearly evident in the Sunshine laws that every legislator is afraid to vote against. Money, sex, politics — further evidence that the more things change, the more they stay the same!

II

TORT LIABILITY OF COLLEGE AND UNIVERSITY FACULTY, ADMINISTRATORS, AND TRUSTEES*

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During the past decade, many college faculty and administrators have been disabused of the notion that they are free from liability for injuries suffered by their students and employees. Presidents, deans, even department chairmen, have found that their role as defendent in civil litigation is not only time consuming, but financially threatening. Faculty members as well have learned through experience that their status as employees of institutions of higher learning does not protect them from suits for injuries suffered in the classroom or as a result of their service on personnel committees. Ours has become a litigious society and it is becoming increasingly important for administrators and faculty to be informed of possible legal problems that arise on the campus in order either to prevent them or to resolve them before they reach the courts. With this purpose in mind, this article will discuss the tort liabilities to which college and university faculty and administrators are exposed and predict future areas of concern.

TORT LIABILITY AND SOVEREIGN IMMUNITY

A tort is the violation of another person's legal rights, by act or omission, for which the courts will provide a remedy in the form of damages to the injured person. Tort liability is civil, not criminal, and torts are classified as either negligent or intentional. The "negligence" in a negligent tort consists of a violation of the standard of care established by law to protect others against an unreasonable risk of harm. In an intentional tort, "intent" refers to the intention to do the act, not necessarily to cause injury. Faculty and administrators are personally liable for their own negligent and intentional torts. The rules of law that are applicable to the tortious conduct of teachers apply equally to college instructors as well as to secondary and elementary teachers, and are generally the same principles relied on as if the teacher were acting in a private capacity outside the classroom setting.

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An injured plaintiff, in deciding whether to sue the person whom he alleges caused the injury, looks toward a prospective defendent who will be able to satisfy a settlement or money judgment after trial. Generally, under the doctrine of *respondeat superior*, the employer is responsible for the acts of his employee within the scope of employment and is usually either the sole or major contributor to the settlement or judgment. In matters involving teachers and administrators of public colleges and universities, however, often this is not the case. Because of the doctrine of sovereign immunity, the public college as employer is immune from liability.

The doctrine of sovereign immunity originated in England, where the courts accepted the belief that the "king could do no wrong" and summarily dismissed cases against the government. The concept was initially applied in the United States by a Massachusetts court in 1812, and was quickly extended to all governmental and quasi-governmental agencies in the various states.[1] In recent years, however, the sovereign immunity doctrine has been abrogated by governments at all levels in the U.S.

In 1975, Ohio joined the majority of states that have generally waived their sovereign immunity.[2] A few states even have passed statutes that provide for direct relief against a school district for damages suffered at the hands of their boards, officers, agents and employees.[3] The broad language in which Ohio abrogated its immunity and consented to be sued and have its liability determined in the newly created Court of Claims, clearly implies that injured persons may now bring suits against state colleges and universities, naming trustees and administrators in their official capacities as defendents. Public school districts (including community and technical colleges) in Ohio, however, were specifically exempted from the statute waiving sovereign immunity and continue to be free from liability suits.[4]

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[1] Mancke, *Liability of School Districts for the Negligent Acts of Their Employees*, 1 J. LAW & ED. 109 (1972). The article discusses the history of sovereign immunity from the perspective of the case of Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788) in England, and its counterpart in the United States, Mower v. The Inhabitants of Leicester, 9 Mass. Rep. 247 (1812) and analyzes the reason courts adhere to the doctrine absent express statutory authority.

[2] On January 1, 1975, the Ohio legislature effectuated OHIO REV.

Prior to 1975, the state's educational institutions could rely on the doctrine of sovereign immunity to protect them from all tort liability suits. The Ohio courts consistently held that the state's educational institutions and their governing boards and officers were agencies of the state, and, sharing in the state's immunity from suit without its consent, could not be sued for negligence in the discharge of their duties.[5]

Both before and after the abrogation of immunity, Ohio

CODE §§ 2743.01-2743.20 which waived the state's sovereign immunity from tort liability and permits suits to be brought in a new court of claims. Of special interest is § 2743.02 that involves agency relationships.

[3] *Supra note* 1. New York, California and Washington expressly provide for this type of suit. *See* Miller v. Board of Education, 291 N.Y. 25, 50 N.E.2d 529 (1943); Herman v. Board of Educ., 234 N.Y. 196, 137 N.E. 24 (1922); N.Y. EDUC. LAWS §§ 2560.3023 in which New York alone adheres to the British rule of liability to the extent of recognizing no immunity for acts of the school board, but extends such immunity to the acts of the board's agents and employees and it incorporates an indemnification against loss to its agents and employees, which includes teachers.

[4] *Supra*, note 2. OHIO REV. CODE 2743.01 exempts "political subdivisions" defined to include school districts as well as municipal corporations, townships, villages and counties. *See* Baird v. Hosmer, 46 Ohio St. 2d. 273, 347 N.E.2d 533 (1976) (Tort immunity is not accorded to teachers).

[5] *See* Wolf v. Ohio State Univ. Hosp., 170 Ohio St. 49, 162 N.E.2d 475

courts have followed the general rule that school administrators are not liable for torts committed by them in the performance of duties involving the exercise of judgment and discretion;[6] the courts have distinguished between "acts of discretion" as to whether a certain act should be performed or the reasonable method for doing it and "ministerial acts" which must be done as a matter of course by virtue of occupying the administrative office.[7] While administrators are liable for torts resulting from their own negligence in the performance of ministerial duties as well as for their own intentional torts, they are not individually liable for injuries caused by the negligence of their employees.[8] Since administrators, faculty and staff are all employed by the same employer, the state, administrators have no personal liability for the actions of their employees under the doctrine of *respondeat superior*. Consequently, there are few grounds for administrators' liability. Perhaps the area of most hazard is the civil rights area, where students and faculty members may claim that their constitutional rights have been infringed, and administrators and trustees may be held personally liable in damages for those infringements.

Even in a jurisdiction that retains sovereign immunity, faculty members are held personally liable for their tortious acts in their role as classroom teacher. (The faculty member performing administrative duties of a discretionary nature, such as serving on a personnel recommendation committee, would presumably have a qualified immunity extended to him

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(1959) (Board of Trustees could not be sued because they were agents of the State of Ohio pursuant to OHIO REV. CODE § 3335.03).

[6] *See* Carroll v. Lucas, 39 Ohio Misc. 5, 313 N.E.2d 864 (1974) (school officials could not be sued for negligently assigning a book that might be injurious to minors as part of the course materials in music class).

[7] Hopkins, Legal Liabilities of Administrators and Trustees of Institutions of Higher Education, 11 Legal Issues for Postsecondary Education, 22 (1975).

[8] Hall v. Columbus Bd. of Education, 32 Ohio App. 2d. 297, 290 N.E.2d 580 (1972) (school board not liable for negligence in permitting a defectively designed and constructed playground to exist).

in a manner analogous to that of the administrator performing discretionary acts in the governance of the university.) Even though immunity has not been extended to the classroom teacher, it has, in most instances, tended to discourage lawsuits and curtail redress that could have been made available to the injured student and explains why, especially in Ohio, there is very little case law on the subject.[9]

CHARITABLE IMMUNITY

The elimination of Ohio's sovereign immunity leaves the state's private educational institutions in a better position relative to state colleges and universities. Private educational institutions are created at the expense of private parties in the corporate sense and are deemed private corporations, which allows them to sue and be sued, and unlike state institutions, private colleges do come under the doctrine of *respondeat superior.*[10] However, these institutions have historically been protected from liability except in rare instances by the doctrine of charitable immunity. This doctrine is grounded in a public policy decision to protect the assets of a charitable institution from suit by individual injured plaintiffs. Ohio courts have enunciated a policy of immunity that releases charitable institutions from liability for tortious injury except 1) when the injured person is not a beneficiary of the institution, and 2) when a beneficiary suffers harm as a result of failure of the institution to exercise due care in the selection or retention of an employee.[11] Ohio follows the majority position in qualifying its immunity on the status of the injured person (treating students as beneficiaries of the charity) and in retaining liability for negligence in hiring employees.[12] However, while Ohio's doctrine of charitable immunity was used to dismiss a suit against Wittenberg College brought by students who claimed to be injured as a result of the college's alleged negligence,[13] recent cases in other jurisdictions have held that a student paying tuition at a private college is not a "beneficiary" of the institution's charity and thus may sue and claim judgment against a private university for negligence.[14] Other jurisdictions recognize the tort liability of the private institution but limit execution of the judgment rendered against it in a tort action to non-trust property.[15]

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[9] See Henson, Schools and Teachers — Tort Liability in our Changing Society, 8 KANSAS L. REV. 124 (1959).

[10] Succession of Hutchinson, 112 La. 656, 36 So. 639 (1904) (whether medical school facility was a private or public institution).

[11] Gibbon, Adm'r v. Young Women's Christian Ass'n of Hamilton, Ohio, 170 Ohio St. 280, 164 N.E.2d 563, 564 (1960).

Most jurisdictions impose liability for torts arising out of noncharitable activities of the school where such activities are primarily commercial in nature, even though carried on for the purpose of obtaining revenue to be used to further the charitable purposes of the school. If a private college is conducting games of chance on its premises for profit, for example, it is engaged in a business enterprise and a person injured at the games would have the opportunity to sue the college without the interposition of the doctrine of charitable immunity.[16] In distinguishing cases, the test used by the courts has been the proximity of the commercial activity to the educational mission of the institution.[17]

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[12] See court's discussion of the wide variation in application of the immunity rule in President and Directors of Georgetown College v. Hughes, 76 App. D.C. 123, 130 F.2d 810 (1942).

[13] *See* Matthews v. Wittenberg College, 113 Ohio App. 387, 178 N.E.2d 526 (1960) (a non-profit religious institution is not liable for tortious conduct resulting in injuries to one of its students).

[14] Heimbuch v. President and Directors of Georgetown College, 251 F. Supp. 614 (1966).

[15] *Supra,* note 12.

[16] Blankenship v. Alter, 171 Ohio St. 65, 167 N.E.2d 922 (1960) (a church in conducting a game of chance on its premises for substantial profit is engaged in a business enterprise and is amenable to a tort action by a patron of the game who sustained personal injuries by a fall when a defective chair, supplied by the church, collapsed).

Many states, in conforming to the abrogation of sovereign immunity, have dealt a similar blow to charitable immunity, but Ohio is one of the few states which has not.[18] There are good public policy arguments for removing immunity from both public and charitable institutions and allowing injured plaintiffs to be compensated for their injuries, and the usefulness of both sovereign and charitable immunity may be outlived, especially since the original purpose of protecting state funds and private charities can be accomplished by the purchase of insurance policies for schools and charitable institutions. Nevertheless, even in jurisdictions that retain immunity protection, it is crucial that the faculty member and administrator understand that the doctrines of sovereign and charitable immunity are for the benefit of the college or university and do not protect the *individual* from liability for acts of negligence.[19]

INTENTIONAL TORTS

The primary scope of intentional torts affecting college personnel is the intentional interference with the person of the student. Assualt and battery comprise the majority of court actions in the area of intentional torts relating to classroom teachers. In a society that is changing rapidly, with more people than ever before using the courts, however, suits for other intentional interferences with the person, such as false imprisonment and defamation, may become more common.

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[17] Miller v. Concordia Teachers College, 296 F.2d 100 (8th Cir. 1961) (operation by college of a dormitory for which fees were required of the student residents held to be encompassed within the general charitable purpose of the school). See also Annot, 38 A.L.R.3d 480 (1971).

[18] *See* Williams v. First United Church of Christ, 40 Ohio App. 2d 187, 318 N.E.2d 562 (1973), *aff'd*, 37 Ohio St. 2d 150, 309 N.E.2d 924 (1974).

[19] Rose v. Board of Education of Abilene, 184 Kan. 486, 337 P.2d 652 (1959). "The cloak of immunity from liability for tort . . . does not extend to an employee of the board of education who, through negligence or other wrongful act, causes injury to another" (however, in *Rose* the employee was a custodian in this case). This was also true in Ohio, *see, e.g.*, the leading case Guyten v. Rhodes, 65 Ohio App. 163, 29 N.E.2d 444 (1940). *See also* Baird v. Hosmer, *supra* note 4 and Annot., 32 A.L.R.2d 1163 (1953).

Assault and battery actions usually arise as the result of disciplinary action taken by the classroom teacher and are actually more common at the elementary and secondary school level than in higher education. Nevertheless, the authority given the teacher through rules and regulations promulgated by the school or college administrations *in loco parentis* is important. These regulations set forth the criteria that the teacher must heed in his or her role, and a determination later may be made by the court as to whether the teacher exceeded the scope of authority. Any teacher who attempts to enforce his or her own individual will upon a student without the authority of written rules and regulations is acting foolishly. A civil lawsuit, criminal prosecution, or both, may result, even if the action taken was in attempt to restore order to the classroom. In such a suit, the teacher will not be able to rely on the institution for support.

There are two clear lines of authority relating to the acceptable parameters of the teacher's administration of corporal punishment.[20] The case of *State v. Pendergrass,*[21] laid down the older rule, which gives the teacher complete discretion as to the necessity of punishment and how it is to be administered. In *Pendergrass,* there was an indictment for assault and battery, the offense being the whipping with a switch which left marks that disappeared within a few days.

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[20] *See* Proehl, *Tort Liability of Teachers,* for an extensive discussion. 12 VAND. L. REV. 723, 734 (1959) [hereinafter cited as Proehl].

[21] 19 N.C. 365, 31 Am. Dec. 416 (1837) (The other view not adopted by the court requires that in inflicting corporal punishment a teacher should exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment, by a consideration of the nature of the offense, the age, size, etc., of the offender. Both views set limits that the teacher cannot overstep, but differ in that the rule adopted by the North Carolina court allows the limit to be set by the teacher, whereas the other requires different degrees of punishment to be graduated to different offenses).

The defendent schoolteacher was found guilty by the jury and the conviction was overturned on appeal. The court applied the concept that the teacher is *in loco parentis* and may exercise personal judgment as to the gravity of the offense and the punishment it merits. The limitations to his power are that no punishment may be inflicted that is of a nature which might cause lasting injury to body or health, and that punishment may not be inflicted maliciously.

The newer or modern rule, stated in *Sheehan* v. *Sturges*,[22] denies the teacher the absolute discretion to determine the necessity of the punishment and leaves as questions of fact the reasonableness and type of punishment to be administered. Here, the pupil violated school rules and the teacher whipped him. The trial court's finding that the "whipping was not unreasonable or excessive and was fully justified by the plaintiff's misconduct at the time" was affirmed by the appeals court, which held[23] that the reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact. In inflicting such punishment, the teacher must exercise sound discretion and judgment, and adapt it to the nature of the offense and the character of the offending pupil.

In Ohio, the *Pendergrass* criteria as to the duration of the injury and malice are followed, but Ohio is in the minority. In *State* v. *Lutz*,[24] the Connecticut Supreme Court set some definite guidelines relating to assault and battery, specifically in criminal cases. The defendent school teacher appealed an assault and battery conviction for paddling a pupil. The punishment revolved around the pupil's lying about throwing a stone at an 11-year-old schoolmate on the way to school, knocking off her glasses. The pupil was spanked from six to 15 times causing tenderness and discoloration to the buttocks for five days. The appeals court held that a teacher is not criminally liable for mere, excessive or immoderate punishment, but that malice, express or implied, and production or threatened production of lasting or permanent injuries must be shown.[25] The supreme court noted there was no evidence that indicated the teacher acted with malice or any serious injury occurred or any punishment occurred in excess of that which the law authorized one standing *in loco parentis* to inflict. In fact, there was ample evidence to indicate the teacher acted in good faith with proper motives. Given this standard, it is fair to speculate that a plaintiff in a civil action, even with the lesser burden of proof—a preponderance of the evidence rather than beyond a reasonable doubt—would have an equally difficult time and a low probability of success.

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[22] 53 Conn. 481, 2A 841 (1885).

[23] 53 Conn. at 482, 2A. at 841.

[24] 65 Ohio L. Abs. 402, 113 N.E.2d 757 (C.P. 1953).

No matter in which jurisdiction the act occurs, the teacher will be in a precarious position if he or she acts before thinking. Reliance upon prior case decisions which generally support the actions of the teacher should not be blindly adhered to because there is an underlying message developing in these cases. That message is now clear—arbitrary, capricious or malicious conduct of the instructor will not be affirmed by the courts.

An action for false imprisonment by a student against an instructor or administrator may appear improbable at this time and, indeed, there is only one reported case in the United States.[26] Generally defined, false imprisonment is the restraint of the person, which he or she is aware of, and which is against that person's will. Think about the student who is properly in the classroom and is denied permission to leave the room, no matter what the reason. Is false imprisonment a viable cause of action? Would an action in false imprisonment lie if the student were warned by the teacher that he would be expelled from school or fail the course if he left the room? The student's age, maturity and the type of school or college are just a few variables which must be considered. There may also be an intentional breach of duty by releasing the person from confinement where that person was properly confined.[27] These examples may seem far fetched but are set forth to stimulate thinking and emphasize that the teacher is legally responsible for his or her own individual actions.

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[25] *See* Martin v. State, 11 Ohio N.P. (n.s.) 183 (C.P. 1910) (which was relied upon as precedent for the *Lutz* case).

[26] Fertich v. Michener, 111 Ind. 472, 11 N.E. 605 (1887) (any reasonable rule adopted by a teacher not inconsistent with a rule or statute of a higher authority, is binding upon the pupil. A rule requiring tardy pupils to remain in the hall is reasonable, and in enforcing it due regard must be had to the health, comfort, age, mental and physical conditions of the pupil and circumstances of each case. A mistake of judgment is not actionable; without wanton, willful or malicious conduct of the teacher, false imprisonment will not lie).

Likewise, defamation is not in the forefront of litigation involving university faculty and administrators. While there are reported cases, they are few in number and hinge on narrow issues,[28] but various classroom situations might be the basis for this type of action: for example, a teacher remarking to a particular student in a classroom filled with his or her colleagues that "You are so dumb you'll never pass this course let alone graduate from college." Suppose the direct language is not used, but by innuendo or other overt actions it can be implied by the class that the teacher indicates that the student is not overburdened with gray matter. Is that actionable? The court will look into the actions of the teacher and will arrive at the intent of the teacher evidenced by that individual's actions. Administrators and faculty who serve on evaluation or admission committees need to be particularly alert to the possibilities of defamation, even though a qualified privilege usually protects statements made in these situations. (A privilege confers upon a person a special benefit or legal sanction to do something, or negatively, it may grant immunity from suit. A special or qualified privilege is bestowed upon certain classifications of persons, such as administrators and

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27. W. PROSSER, LAW OF TORTS 42 (4th ed. 1971).

28. *See, e.g.*, Kenney v. Gurley, 208 Ala. 623, 95 So. 34 (1923) (action of libel against college dean and college doctor reversed in their favor with court holding that their letters to parents as to why daughters could not be permitted to return to the college [plaintiff minor had venereal disease] as a student were conditionally privileges communications).

professors, and requires that the person conveying information or doing an act within his or her authority, do so for reasons which protect the interest of the public, third parties or the person who is the beneficiary of the privilege.[29])

NEGLIGENCE

Simply defined, negligence is conduct that falls below a standard of care established by law to protect others against an unreasonable risk of harm.

The college administrator is personally liable for his own negligence but not for the negligence of employees where the administrator was not personally involved in the negligence. Sued in their official capacities, trustees and administrators have been held not to be liable for injuries caused by falling telegraph lines,[30] formation of a lump of ice on an outdoor skating rink,[31] injuries on football practice field,[32] or sustained during horseback riding lessons,[33] or for decline in a student's morals.[34] When sued for negligence, the university has available the usual tort defenses, including absence of proximate cause, contributory negligence on the part of the student and assumption of the risk, and these latter two are more likely to prevail at the college level that at the elementary or secondary level because of the presumed greater maturity of college-age students.

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[29] An example of the application of the special or qualified privilege that may arise under the Civil Rights Acts. 42 U.S.C. § 1983 (1963) is found in Wood v. Strickland, 43 U.S.L.W. 4293 (1975). The Supreme Court, in that case, held that liability for all actions which violate a student's constitutional rights would impose an undue burden upon the school in exercising their official decision making powers. Rather, school officials will be granted immunity so long as the action taken is a good faith fulfillment of responsibility and within the borders of reason. Liability will follow only if the action is taken in bad faith or with malicious intent.

[30] Lundy v. Dalmas, 104 Cal. 655, 38 P. 445 (1894) (board of regents of state university held not to be personally liable to a person injured by a telegraph wire fallen from an allegedly negligently maintained line).

[31] Mortiboys v. St. Michael's College, 478 F.2d 196 (2d Cir. 1973) (evidence insufficient to support conclusion that small lump of ice over which student fell while engaging in hockey game on outdoor rink existed for sufficient time to render college officials negligent in failing to discover and correct the potential hazard).

[32] Cramer v. Huffman, 390 F.2d 19 (2nd Cir. 1968) (physician's alleged negligence in failing to advise coach that student was unfit to participate in football practive after hospitalization could not be imputed to the university). *Cf.* Wells v. Colorado College, 478 F.2d 158 (10th Cir. 1973), where university was held liable for injuries sustained by a student when she was thrown onto a hardwood floor rather than protective mat by her judo instructor; plaintiff made out a prima facie

The administrator's responsibility for supervision has been expressed as being that which a person of ordinary prudence would observe in comparable circumstances;[35] some jurisdictions have expressed the duty as being that which a parent of ordinary prudence would observe, paralleling the notion that the university stands in place of the parents.[36] Frequently, the issue of proximate cause arises in a case of injury caused by a sudden attack by another student or a visitor to the campus. Universities may be held liable for failure to provide adequate supervision during classroom activities; however, this requirement is predicated upon the reasonableness of an apprehension that it is required.[37] In connection with

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case of negligence because the activity was a hazardous one and performed by an expert whose duty of care was commensurate with the degree of hazard.

[33] Stephenson v. College Misericordia, 376 F. Supp. 1324 (1974) (college officials were not liable for injuries sustained by student taking horseback riding lessons at off-campus stable in fulfillment of college's physical education requirement).

[34] Hegel v. Langsam, 29 Ohio Misc. 147, 273 N.E.2d 351 (1971) (university could not be found liable to parents of 17-year-old female student for allegedly permitting daughter to become associated with criminals, to be seduced, to become a drug user and to be absent from her dormitory and for failing to return her to her parents' custody on demand).

[35] Titus v. Lindberg, 49 N.J. 66, 228 A.2d 65 (1967). See also Annot. 38 A.L.R.3d 830 (1971).

[36] Hoose v. Drumm, 281 N.Y. 54, 22 N.E.2d 233, reh.den., 286 N.Y. 568, 35 N.E.2d 922 (1941)

[37] Ziegler v. Santa Cruz City High School Dist., 168 Cal. App.2d 277, 335

activity outside the classroom, two questions arise: was a duty owed to the injured person, and if so, was such duty reasonably satisfied by the provisions made by the university. With the increasing incidence of crimes against the person on college campuses, universities may expect future litigation to include questions of responsibility for providing adequate security personnel to patrol grounds and dormitories.

Teaching faculty are legally responsible for the safety and welfare of students assigned to their classroom, shop, laboratory, or gym class.[38] The teacher's liabilty for damages resulting from his negligence in or about the school rests upon the same principles and defenses as does the liability of a private person away from the school. The same standard of care applies, that of a reasonable and prudent person acting under like circumstances.[39] An individual teacher must take precautions to avoid acts or omissions which he can reasonably foresee would be likely to injure his students.[40] Thus, the accepted standard of care imposes a duty on the teacher owed to the student or students. If the breach of the duty causes damage or injury, liability will rest with the teacher. The duties of a teacher are the duty of supervision and the duty of instruction.

DUTIES OF SUPERVISION AND INSTRUCTION

The majority of the litigation involving adequate supervision falls into the realm of the teacher who is absent from the classroom when a student is injured. There is no uniform standard as to what proper supervision is except to state that it varies from jurisdiction to jurisdiction. The duty of supervision is an affirmative one and the standard of care is

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P.2d 709 (1959); Beck v. San Francisco Unified School Dist., 225 Cal. App.2d 503, 37 Cal. Rptr. 471 (1964).

[38] Vacca, *Teacher Malpractice*, 84 UNIV. RICH. L. REV. 447 (1974).

[39] Proehl, *supra* note 11, at 752.

[40] Seitz, *Tort Liability of Teachers and Administrators for Negligent Conduct Toward Pupils*, 20 CLEV. ST. L. REV. (3) 551 (1971).

"ordinary care" or "ordinary prudence."[41] While schools cannot offer constant supervision there must be evidence that a thought-out plan of supervision existed at the time of the accident.[42] A case in point is one in which two students were implementing a potentially dangerous experiment in the chemistry laboratory when the instructor was called away. An explosion occurred and in attempting to quash a fire that ensued, one student was injured. The Washington court held there was sufficient evidence to find inadequate supervision.[43]

Similar fates have befallen gym teachers who leave their classes, many times on school business. The courts have usually held that had the teachers been present they could have foreseen the consequences of the acts that injured the students and their absences were found to be the proximate cause of the accidents.[44]

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41. *See* Brooks v. Jacobs, 139 Me. 371, 31 A.2d 414 (1943) (student fell from staging during course in vocational training); Segerman v. Jones, 256 Md. 109, 259 A.2d 794 (Ct. App. 1969) (pupil kicked another pupil during teacher's absence, absence was not proximate cause); Gaincott v. Davis, 281 Mich. 515, 275 N.W. 229 (1937) (teacher directed student to water plant in classroom and the glass vessel shattered. The test was one in which the ordinary prudent person would be able to foresee the accident); Ohman v. Board of Education, 300 N.Y. 306, 90 N.E.2d 474 (1949) (pencil thrown when teacher out of room cannot be foreseen by teacher); Drum v. Miller, 135 N.C. 204, 47 S.E. 421 (1904) (teacher threw pencil at pupil causing serious eye injury and was held to have anticipated the consequences of his act); Guyten v. Rhodes, 65 Ohio App. 163, 29 N.E.2d 444 (1940) (teacher left classroom and pupil known to be a troublemaker threw milk bottle at classmate injuring classmate whom he had previously assaulted. Teacher no liable because absence was not the proximate cause of the injury adopting the philosophy of *Ohman).*

42. Butler v. District of Columbia, 417 F.2d 1150 (D.C. Cir. 1969). (Student struck in eye with sharp object by pranksters when entering printing classroom and was warned by classmate of the impending prank. Teacher was on cafeteria duty pursuant to a school plan thought to be best to promote safety and found not liable). See the dissenting opinion which argues teacher and school were on notice that boys roughhouse and throw type and would be prima facie case.

43. Jay v. Walla Walla College, 53 Wash. 2d 590, 335 P.2d 458 (1949).

44. Schnell v. Travelers Insurance Company, 264 So. 2d 346 (La. App.

It is interesting that the only reported Ohio decision dealing with a teacher's liability for his conduct in the classroom is *Guyten v. Rhodes.*[45] In that case the teacher was not found liable for leaving the classroom unattended, even though during the absence one student assaulted another, and the teacher had knowledge that several students had in the past assaulted classmates. Given this situation, outside of the classroom and school, the absent supervisor probably would have been found liable because the absence was the proximate cause of the injury. The theory has been advanced that the decision in the case absolving the absent teacher from liability may have discouraged the filing of similar cases.[46] It is suggested, however, that the doctrine of sovereign immunity may have been a more important factor discouraging litigation.

It is not only the instructor who leaves the classroom unattended, or in the hands of a young pupil who risks suit, but also the instructor who is present and improperly oversees or supervises the students. These situations can occur in the regular classroom, but are more pronounced in the laboratory or gym. In another case involving a chemistry experiment that caused an explosion, the instructor was found liable even though he was present during the experiment. In *Damgaard v. Oakland High School Dist.*,[47] the California Supreme Court held that the essence of negligence is failure to exercise due care and take proper precaution. The instrument that exploded was under the exclusive management of the instructor. In the

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1972) (teacher found liable in leaving sixth grader to "mind" first graders without supervision and accident occurred to the child that was "minding"); Cirillo v. City of Milwaukee, 34 Wis. 2d 705, 150 N.W. 2d 460 (1967) (Supreme Court reversed trial court which held teacher liable as matter of law leaving gym class unattended).

[45] 65 Ohio App. 163, N.E.2d 444 (1940).

[46] Dugan, *Teachers' Tort Liability*, 11 CLEV. MAR. L.REV. (3) 512, 514 (1962).

[47] 212 Cal. 316, 298 P. 983 (1931).

ordinary course of events an explosion does not occur with proper use, and in the absence of any explanation of the defendent teacher as to what occurred, the instructor was liable in negligence under the doctrine of *res ipsa loquitur* ("the thing speaks for itself"). It is the duty of the teacher to prevent injury and supervise properly.[48]

The duty of supervision can be extended to include the disciplining of the student and rendering aid or assistance to the student. The conduct of the teacher is expected to be reasonable. In the often cited case of *Guerrieri v. Tyson,*[49] an extreme administering of first aid occurred when a teacher treated a student's infected finger by forcing it into scalding water for ten minutes which caused the student to be hospitalized for 28 days. The Pennsylvania Supreme Court held that the doctrine of *in loco parentis*[50] did not extend to sanctioning negligent conduct and unreasonable discipline.

While most of the litigation has focused on the teacher's duty of supervision, the primary reason for the teacher's presence in the classroom is to teach students. There are two basic duties related to instruction.[51] The first is that instruction result in the student's mastery of certain processes and basic skills. The second duty is that students not participate in any activity without adequate and proper instruction from the teacher regarding the performance of the specific function.

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[48] *See* Govel v. Bd. of Education, 48 N.Y.S.2d 299 (1944) (gym teacher held liable for assigning students exercises not within their ability to perform). Of note is the law of teacher indemnification discussed in this case. The teacher, even if negligent, is indemnified through insurance policy purchased by school pursuant to state law. *See* authorities cited in note 5 *supra.*

[49] 147 Pa. Super. 239, 24 A.2d 468 (1942).

[50] *See* Proehl, *Supra* note 11 for an in-depth history, discussion and analysis of *in loco parentis.* He describes abuse of discipline as an intentional tort.

[51] Vacca, *supra* note 20, at 452, 453.

Litigation has been sparse in challenging the instruction of students in the traditional sense. In a 1972 case, however, the California court of appeals held that a student who sought damages because her professor, who had joined a faculty protest, refused to give all the lectures in the course or to give a final examination might have a cause of action.[52] The student had received a grade of "B" in the course, but she wanted knowledge as well; "The mere receipt of a grade in this course does not add a thing to my actual qualifications,"[53] she had written in a letter demanding that the instructor complete the course.

In a more recent California case involving breach of duty of instruction, the plaintiffs alleged that their son was never actually taught to read, and as a direct result of that inability, the young man had been damaged in that he was unable to secure employment.[54] The California Court of Appeals, however, ruling that literary achievement was affected by numerous factors outside the classroom that were beyond the school's control, ruled in favor of the school district.

In another case, this one at the elementary level,[55] the mother of a physically handicapped child petitioned the court for an order directing payment of her child's full tuition by the State of New York for attendance at a non-public special education facility. She alleged that the child had made practically no educational progress during the three and one-half years he was attending public school, but during one year at the non-public facility had made remarkable progress. The family court found that in light of this evidence the City and State of New York must pay the expenses at the non-public institution.

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[52] Zumbrun v. University of Southern California, App., 101 Cal. Rptr. 499 (1972).

[53] *Id.* at 502.

[54] Peter W. v. San Francisco Unified School Dist. 60 C.A. 3d 814, — Cal. Rptr. — (1976).

[55] In the Matter of Peter H., 66 Misc. 2d 1097, 323 N.Y.S.2d 302 (Family Court, Westchester City, 1971). *See also* N.Y. EDUCATION LAW § 4403, 4407.

It is important for the teacher to know that prior to any classroom related activities which demand student performance, proper instruction, explanation and probably demonstration relating to the specific endeavor, should be completed. Most of the litigation relating to the duty of instruction relates to dangerous situations, usually involving physical education instructors, shop teachers or science teachers, and the professional judgments which they exercised or failed to exercise.

In those situations, instruction as to basic procedure is mandated. Consideration should be given to the difficulty of the activity with suggestions as to the conduct expected during the performance of the activity, and the indentification of risks involved. The age level, maturity, and past experience of the student also enter into the extent of the instruction required.[56]

Detailed care in explaining to the student how the activity should be performed and clarifying inherent danger, especially when working with chemicals was described effectively in *Mastrangelo v. West Side Union High School Dist.*,[57] where the instructor was present during an experiment with gunpowder. The student mingled a substance not called for by the written text passed out by the instructor, causing and explosion and injury. The California Supreme Court stated:

> [I]t was not unreasonable to assume that it is the duty of a teacher of chemistry, in the exercise of ordinary care, to instruct students regarding the selection, mingling and use of

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[56] *Vacca, supra* note 20, at 453; Kiser v. Snyder, 21 N.C. App. 708, 205 S.E.2d 619 (1974) (duty to warn).

[57] 2 Cal. 2d 540, 42 P.2d 634 (1935). *See* Brigham Young University v. Lillywhite, 118 F.2d 836 (10th Cir. 1941); Damgaard v. Oakland High School Dist., 212 Cal 316, 298 P. 983 (1931) (the doctrine of res ipsa locquitor applied).

ingredients with which dangerous experiments are to be accomplished, rather than to merely hand them a text-book with general instructions to follow the text.[58]

Specificity of instruction is acute to the shop teacher whose class uses machinery, be it simple or complex. Any demonstration that is used to complement the instruction also must be precise. In *Ridge v. Boulder C. Union Junior-Senior High School Dist.*,[59] the court of appeals found the instructor liable for injury to the student. The instructor had demonstrated the use of a power saw without the safety guard attached to the machine although it was available. The student subsequently used the saw without the guard and was injured.

The instructor must have complete knowledge of the equipment that he or she expects the student to use, which includes knowledge of the risk of harm. If there is any chance of danger in performing activities there must be instruction, warning and information communicated to the student. This is best illustrated by the case of *La Valley v. Stanford*,[60] where a physical education instructor allowed two students to box while he sat in the bleachers. The New York court held that it was the duty of the teacher to exercise reasonable care to prevent injury. In not warning or instructing the students as to the hazards and dangers of boxing, he failed in his duty and was held to be negligent.

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[58] Mastrangelo v. West Side Union High School Dist., 2 Cal. 2d at 542, 42 P.2d at 636 (1935).

[59] 60 Cal. App. 2d 453, 140 P. 2d 990 (1943). *See also* Clark v. Board of Education of City of New York, 304 N.Y. 488, 109 N.E. 2d 73 (1952) (inadequate instruction by gym teacher as to students doing somersaults); Armlin v. Board of Education of Middleburgh Central School District, 36 App. Div. 2d 877, 320 N.Y. 2d 402 (1971) (teacher never demonstrated any stunts and spotters not instructed how to perform as to the gym apparatus [rings] and teacher did not follow State Education Syllabus that was in effect); Severson v. City of Beloit, 42 Wis. 2d 559, 167 N.W.2d 258 (1969) (instructor failed to advise student of hazards of operating grinder machine without a guard).

[60] 272 App. Div. 183, 70 N.Y.S.2d 460 (1947).

The duty of instruction assumes that the equipment needed to perform the activity safely had been provided and was available. If the equipment was not available, the question of proximate (that is, legal) cause is involved. In *Meyer v. Board of Education,*[61] the New York Court of Claims held that the absence of the safeguard on the saw was not the proximate cause of injury. The cause of the injury was a fellow student who turned on a switch in violation of known safety instructions and broke the chain of causation that might otherwise have been attributed to the Board of Education and the instructor who was present.

The unavailability of the equipment can be the proximate cause of the injury, exposing the instructor as well as the institution to liability if the institution can be sued. Therefore, the instructor should not proceed with the activity if all safety conditions are not met, especially if there is a violation of a safety statute.

In *Weber v. State*[62] the claimant was a student in the New York State Agricultural and Technical Institute. While attending a carpentry class with the instructor present, he fell from a scaffolding that the class was constructing. The safety laws required a safety rail which was not present. The court held that the state and instructor had breached their duty to comply with the statute. The instructor was not a named defendent since the claim was filed in the New York Court of Claims solely against the State of New York.

Available equipment will not relieve liability per se. The equipment must not be defective.[63] The teacher could be found negligent in the performance of his duties in allowing students to use equipment or tools, which the teacher did not know were defective and improper, if he should have known.[64]

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[61] 9 N.J. 46, 86 A.2d 761 (1952). *See also* Lehmann v. Los Angeles City Board of Education, 154 Cal. App. 2d 256, 316 P.2d 35 (1950) (school board should have provided safeguard for a press); Kirchner v. Yale University, 150 Conn. 623, 192 A.2d 641 (1963) (push block not available); Duncan v. Koustenis, 260 Md. 98, 278 A.2d 547 (1970) (teacher improperly secured guard on automatic planer and student lost parts of two fingers).

[62] 53 N.Y.S.2d 598 (Ct. of Claims 1945).

[63] *See* Thomas v. City of New York, 285 N.Y. 496, 35 N.E.2d 617 (1941);

While there are no reported cases in Ohio regarding the failure to instruct, the lack of cases relating to the teaching of basic skills and communicating knowledge belies what may come. There is a new wave of consumerism in education. This new frontier has expanded to the doorsteps of several universities.[65] Students are attending schools and universities to learn and are not going to be satisfied by "vacuum" courses. The duty of instruction should be rethought and taken seriously.

CIVIL RIGHTS LITIGATION

Although there is a paucity of cases in which university administrators have been found personally liable for conventional negligence torts, during the past decade, administrators have experienced a heavy exposure to a different kind of tort. The Civil Rights Acts, passed in the 1860's and 1870's and originally intended to protect the liberties guaranteed by the Bill of Rights to the newly freed slaves, have recently provided the basis for a rash of suits by faculty and students for claimed violations of their constitutional rights.

Codified at 42 U.S.C. § 1983, the Civil Rights Act of 1871 reads:

> Every person who, under color of any statute,

Banks v. Seattle School Dist. No. 1, 80 P. 2d 835 (Wash. 1938) (machine may not have been set up properly to allow clearance).

[64] Crabbe v. County School Bd. of Northumberland Co., 209 Va. 356, 164 S.E.2d 639 (1968) (teacher allowed student to use defective power saw. If teacher did not know of defect, he should have known about the defect).

[65] *See* The Wall Street Journal, March 16, 1975, at 16. The subtitle of the editorial is "An Educational Revolution." A student at the University of Bridgeport filed suit claiming she paid $150.00 tuition for a course entitled "Methods and Materials in Teaching Basic Business Subjects" that did not teach her anything.

> ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceeding for redress.

To meet the first requirement under the statute, the conduct complained of must be engaged in under color of state law. Administrators in public institutions come within this requirement daily, in writing contracts, hiring or discharging faculty, disciplining students, releasing student records, recognizing campus organizations, authorizing use of campus facilities for outside organizations; this provision does serve though to immunize both private defendents and Federal agencies and officers from § 1983 suits. The second essential requirement under the statute is that the conduct subjected the plaintiff to a deprivation of rights, privileges, or immunities secured by the Federal Constitution and laws. The most frequent allegations have been based on violations of the First and Fourteenth Amendment rights: faculty whose contracts have not been renewed may bring suit claiming that their nonrenewal was effected either without due process or in retaliation for the exercise of First Amendment rights; students may use § 1983 to sue administrators for expulsion or suspension in violation of due process or in retaliation for exercise of First Amendment rights, for censorship of a college newspaper, or to claim that the university's nonrecognition of their student organization violated First Amendment rights of association or free speech; both faculty and students have used § 1983 as well as the 1964 Civil Rights Act to allege unlawful discrimination based on race or sex.

Since jurisdiction under § 1983 is in the federal courts rather than the state,[66] litigation under the Civil Rights Acts presents a problem of sovereign immunity. The Eleventh Amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state . . . "[67] The Supreme Court, in *Edelman v. Jordan,* held that the Eleventh Amendment bars suits against the State not only when it is the named party but also when it is the party in fact.[68] Moreover, in *Monroe v. Pape*[69] in 1961, the Supreme Court decided that all states, counties, municipalities, and their official agencies, boards and departments were immunized from § 1983 suits, simply on the ground that Congress had not intended to include them as "persons" under the statute; consequently, boards of regents and boards of trustees, as agencies of the state, are not persons under the act and cannot be sued as a body either for damages or for equitable relief.

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[66] 28 U.S.C. 1343(3).

The Eleventh Amendment restriction, combined with the further requirement under § 1983 that the defendant be a "person," has focused attention on administrators in their individual capacities as the only available defendants in § 1983 Civil Rights Acts suits. As early as 1908, in *Ex Parte Young,*[70] the Supreme Court had declared that the Eleventh Amendment immunity defense does not preclude suits for equitable relief against public officials acting in their official capacities; thus, members of the board of trustees, presidents, and deans, in their official capacities are "persons" and can be sued and compelled to provide equitable relief in suits brought by faculty and students under these acts.

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[67] U.S. CONST. amend. XIV.

[68] 94 S. Ct.1347 (1974). In *Edelman,* plaintiffs brought a class action seeking declaratory and injunctive relief under 42 U.S.C. 1983 against directors and administrators of Cook County Department of Public Aid for delaying tactics in the administration of federal Aid to the Aged, Blind, and Disabled; a court divided 5-4 held on Eleventh Amendment grounds that federal court suits against public officers were limited to prospective relief wherever retrospective relief, in money damages or "equitable restitution," was necessarily intended to be paid out of state funds. For a discussion of the implications of *Edelman* for suits against college administrators, see Aiken, Tort Liability of Governing Boards, Administrators and Faculty in Higher Education, 2 Journal of College and University Law 129 (1975).

[69] 81 S.Ct. 473 (1961).

[70] 28 S.Ct. 441 (1908) (State attorney general was subject to federal court injunction that prohibited him for attempting to enforce state railway

More problematic for administrators, however, have been the decisions that hold that members of the board, presidents, and deans named as defendants individually, as well as in their official capacities, can be sued for money damages and held personally liable. The recent Supreme Court case of *Wood v. Strickland*[71] held that members of the school board could be held personally liable in damages for suspending students without due process. In *Wood,* public high school students who had been expelled from school for violating a school regulation prohibiting the use of intoxicating beverages at school activities brought suit under the Civil Rights Acts, claiming that their expulsion had violated their constitutional rights to due process.[72] The Supreme Court recognized that school officials, on the basis of common-law tradition and public policy, are entitled to a qualified good faith immunity from liability for damages under the Civil Rights Act. An immunity defense will shield them from individual liability if they can prove that their acts complained of were done within the scope of their official duties, in good faith, without malice, and with a sincere belief that they are doing right, but the Court nevertheless held that school officials are not immune from liability for damages if they knew or reasonably should have

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rate regulations whichwere confiscatory; he was also subject to fine when he violated the injunction).

[71] 95 S.Ct. 992 (1975).

[72] In Goss v. Lopez, 95 S.Ct. 729 (1975), the Supreme Court struck down an Ohio statute which permitted a 10-day suspension of a student without prior notice and hearing as a violation of and interference with student property rights under the due process clause of the Fourteenth Amendment.

known that the action taken within their sphere of official responsibility would violate the student's constitutional rights. In essence, the school board member's immunity is qualified, not absolute, and once the plaintiff has successfully raised the constitutional claim, the administrator must present a defense on the merits.

Although the courts have repeatedly declared that it is not the role of the federal courts to set aside the decisions of school administrators made for the furtherance of educational purposes,[73] the courts have been active in protecting constitutional rights of students, especially during the 1960's and 1970's when students' political protests sometimes provoked university administrators to invoke their police powers in violation of the students' rights and liberties. In *Healy v. James,*[74] students who had undertaken to form a local chapter of Students for a Democratic Society had been denied official recognition as a campus organization by the president at Central Connecticut State College. Basing their case on the president's statement that he had refused recognition of the organization because its philosophy was antithetical to the school's policies and that its independence from the national SDS organization was doubtful, the students filed suit alleging denial of First Amendment rights of expression and association. The Supreme Court held that denial of use of campus facilities for meetings is a substantial burden on freedom of expression and that once an organization has petitioned for recognition, in conformity with university requirements, the burden is on the university to justify its rejection. That rejection may not be based on unconstitutional attempts to prohibit free speech and expression. The Court did point out an acceptable grounds for refusal to recognize a campus organization: the university may require that a group affirm in advance its willingness to adhere to reasonable campus law, and a group's stated unwillingness to be bound by reasonable rules of the university is grounds for rejection of recognition. Advocacy is entitled to full constitutional protection; action is not.

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[73] See e.g., *Wood v. Strickland,* 95 S.Ct. at 1003 and cases cited therein.

[74] 92 S.Ct. 2338 (1972).

Applying the rule of *Healy v. James* to social activities as well as informational meetings, the First Circuit Court in *Gay Students Organization of New Hampshire v. Bonner*[75] upheld a § 1983 suit for injunctive relief against individual officers of the university after the university president refused to allow the group to schedule further social functions on the campus. The court held that social activities (including the homosexual dance sponsored by the plaintiffs) are protected First Amendment activities and that it was the expression of ideas, not the social event itself, that shocked the university. While the court cushioned its judgment by noting that universities can regulate and prevent illegal activities that fall short of conduct if such advocacy is directed at producing or is likely to incite imminent lawless acts or materially and substantially disrupt the work and discipline of the school, the clear message from these cases[76] is that the courts will jealously guard students' constitutional rights, and that administrators infringe on them at their peril.

The majority of faculty members' suits under § 1983 have been inspired by the decisions handed down by the Supreme Court in *Board of Regents v. Roth*[77] and *Perry v. Sindermann*[78] holding that it is a violation of procedural due process to dismiss a faculty member who has an expectancy of renewal without notice of reasons and an opportunity for a hearing; while a university can terminate a faculty member without any reason, it cannot do so for an unconstitutional reason, e.g., in retaliation for exercise of freedom of speech.

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[75] 509 F.2d 652 (1st Cir. 1974).

[76] See also Antonelli v. Hammond, 308 F.Supp. 1329 (D. Mass. 1970) (university president's attempt to censor campus newspaper on basis of obscenity unconstitutional); Depperman v. University of Kentucky, 371 F.Supp. 73 (E.D.Ky 1974) (discharge of student from medical school for "interpersonal deficiencies" rather than for academic failure); Stacy v. Williams, 306 F.Supp. 963 (N.D. Miss. 1969) (university regulation governing off-campus speakers unconstitutionally vague); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) (university regulation authorizing expulsion of student for "misconduct" constitutionally impermissible).

[77] 92 S.Ct. 2701 (1972).

Faculty members who have brought suits under § 1983 have been successful in winning both equitable and monetary relief. In *Smith v. Losee,*[79] a nontenured associate professor successfully brought suit against the college president and two deans, alleging wrongful denial of tenure. The trial court found that the denial was taken for the purpose of punishing Smith for having supported a particular candidate in a state political election and for having opposed the college administration in his capacity as president of the faculty association. Reviewing the appeal, the Tenth Circuit awarded Smith $4,100 in actual damages and $5,000 in punitive damages against the president and the deans in their individual capacities. The court held that it would apply a qualified immunity for the individual defendants, based on good faith, but that the defendants had failed to carry the burden of proving that their actions were taken in good faith. Smith had also sued the members of the Utah Board of Education for their ratification of his nonrenewal. The court, however, found no damages recoverable against the board, since it had merely affirmed the president's decision not to renew Smith.

The lower courts have followed the general rule that there is no *respondeat superior* liability under § 1983; plaintiffs must prove either actual personal misconduct or actual knowledge of the challenged actions of their subordinates and acquiescence in them.[80] This is not as comforting as it may at first

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78. 92 S.Ct. 2694 (1972).

79. 485 F.2d 334 (10th Cir. 1973).

80. Taliaferro v. State Council of Higher Education, 372 F. Supp. 1378, 1385 (E.D. Va. 1974) (women faculty members sued state council and named defendants for sex-based discrimination in regard to promotions, working conditions, and salaries vis a vis men at the same institution; court held suit could be maintained against defendants in

appear. In the absence of specific acts by persons in charge, some courts have held that proof of acquiescence can be advanced through a showing of "a pattern of close supervision by the defendants and that the acts complained of were part of a consistent pattern of conduct of the subordinates."[81]

In both *Adamian v. University of Nevada*[82] and *Hander v. San Jacinto Junior College*,[83] discharged faculty members brought § 1983 actions against the board of trustees, alleging that they were unconstitutionally discharged for exercising First Amendment freedoms; in both cases, the courts allowed the faculty members to recover back pay in addition to reinstatement, even though the board members were sued in their official, rather than individual capacities, justifying the money awards as "equitable restitution" instead of damages, and therefore payable by the boards in their official capacities.

Other courts have not been so concerned with the niceties of the pleadings. In *Byron v. University of Florida*,[84] a woman staff assistant brought a sex discrimination suit against the university officials, president and plant manager, in their official or representative capacities only; the plaintiff sought back pay and reinstatement in her position as staff assistant. The district court noted that the Eleventh Amendment prohibited claims against the university for back pay, but,

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their individual capacities for acts done in the course of official functions even though they were not subject to suit in their official capacities), citing Cook v. Cox, 357 F. Supp. 120, 126 (E.D.Va. 1973). See also, District of Columbia v. Carter, 93 S.Ct. 602 (1973).

[81] *Id.* at 1385.

[82] 359 F. Supp. 825 (D. Nev. 1973) (university regulation governing professors' speaking and writing activities was unconstitutional).

[83] 519 F.2d 273 (5th Cir. 1975) (university regulation setting "reasonable" hair styles for faculty members constitutionally impermissible under due process and equal protection guarantees).

[84] 403 F.Supp. 49 (N.D. Fla. 1975).

following *Scheuer v. Rhodes*,[85] the court affirmed the policy of the Federal Rules against overly technical construction of the pleadings, and therefore ruled that a claim for back pay could be had against some or all of the defendants individually.

In addition to claims under the First and Fourteenth Amendments, administrators should be alert to the possibility of violations of other constitutional rights. Students, for example, might bring § 1983 suits after an allegedly unconstitutional search and seizure. The search of lockers and dormitories and the seizing of the fruits of these searches are in the forefront of protracted legal battles. Search and seizure goes to the essence of a protected constitutional right[86] and must be recognized by instructors and administrators, especially in jurisdictions such as Ohio where *in loco parentis* in the older sense still prevails. While courts have maintained the right of search by a high school principal,[87] questions as to the search of college dormitories[88] are not settled, and the volume and diversity of school and college cases is beginning to mount.[89] It is an area that teachers and administrators should consider in everyday situations, e.g., before confiscating contraband from a student that might later be used as evidence to expel him.

The Buckley Amendment legislation relating to students' privacy[90] in relation to school records may also become the source of future litigation. More and more the law is intruding into areas of sanctuary taken for granted by professors and administrators.

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[85] 94 S.Ct. 1683 (1974) (suit by students and parents at Kent State University against governor and other officials of the State of Ohio, claiming damages under 42 U.S.C. 1983).

[86] U.S. CONST. amend. IV.

[87] *See, e.g.*, State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969) (search of high-school locker inherent right of principal).

[88] *See, e.g.*, People v. Kelly, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (1961) (college dormitory).

[89] *See generally* Annot., 49 A.L.R.3d 978 (1973).

[90] General Education Provisions Act (Federal) 513.(a)(C), 438. (a)(1), 514. (a)(C), 439.

CONCLUSION

In spite of their protested reluctance to interfere in the education process, the courts have indicated a growing willingness to involve themselves in school and college problems. This is a change of judicial philosophy from the prior "hands-off" attitude; educational institutions should now be aware of their potential answerability to the court system and adjust institutional conduct accordingly.

This article has discussed the tort liability of the teacher and administrator as well as the impact of sovereign immunity on that liability. Traditionally, sovereign immunity has protected the educational institution; states such as New York, which have waived their immunity, have evidenced more litigation, especially in the negligence field, than states that have maintained immunity. In Ohio, where the doctrine of sovereign immunity has recently been abrogated, it is predicted that more lawsuits will be brought against both teachers and their institutions. The issues raised and discussed here will be resolved and expanded upon in Ohio's new Court of Claims.[91]

College and university administrators and faculty must recognize that there are legal duties that they owe to their students and that the breach of a duty can bring on a lawsuit. With a more sophisticated, consumer-oriented society developing, the likelihood that litigation will be entered into is greater now that in the past.

Education and the law will be narrowing a gap that secondary and higher education have always enjoyed, *i.e.*, autonomy. Recent history indicates that the courts will have more influence on the conduct of the teachers and the administrator than the educators ever dreamed of.[92]

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[91] OHIO REV. CODE ANN. §§ 2743.01-.20 (1975).

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[92] Barton, *Where Does It Hurt Professor?* CHRONICLE OF HIGHER EDUCATION, May 5, 1975, at 32. "The doctor takes responsibilities that professors have consciously avoided, while we deal with students who never sue. Can you imagine how high the premiums would be for malteaching insurance? We could clog the courts."

III
FACULTY CONTRACTS: MAJOR CONCERNS

Richard R. Perry

Administrators and faculty are increasingly concerned with establishing clear concepts of what constitutes a contract between a college or university and a faculty person. All need to be concerned about those documents which spell out the conditions under which a faculty person serves an institution of higher education and those remunerations which are provided that individual for services. In addition, there are such concerns as: trying to understand when a valid contract has been arranged with a faculty person; whether it is a fact that both parties clearly understand the conditions of the contract; what conditions can exist to justify termination of the relationship between the institution and the individual; and, what must be guarded against by both the individual faculty person and the institution in entering into a contract. Finally, it is evident in times like these, in which funding patterns change suddenly and in which program needs shift continously, that matters of financial exigency, the necessities of modifying existing policy governing the faculty as individuals and as a body politic on a campus, and the over-arching concern of due process, both substantive and procedural, are also major concerns.

The fine technicalities of the law and their explanation are to be left to the legal expert (and wisely so) but the responsibility of the administrator in faculty contracts — whether he be a department chairman, the dean, the vice president for academic affairs, the president, or a member of the board of trustees — is so important that the persons who occupy these positions must be ever mindful, ever cautious, and ever alert to the difficulties which surround the formal association of faculty persons with an institution of higher learning. The absence of adequate language, clear understanding of the meaning of language used, and careful adherence to the regulations of the institution make faculty contracts a topic of serious concern.

THE ESSENCE OF A CONTRACT

In searching for an answer to the question "what is a contract?" it is rather unsettling to encounter the statement of an acknowledged authority on the law of contracts who has said very simply "no entirely satisfactory definition of the term 'contract' has ever been devised."[1] He goes on to say,

> the difficulty of definition arises from the diversity of the expressions of assent which may properly be denominated 'contracts' and from the various perspectives from which their formation and consequences may be viewed.[2]

Although the various perspectives mentioned by Calamari and the several expressions of assent and the varied character of offers which are made are boundless in the world outside of academe, they hardly match the diversity and dynamics of the offer and assent situation which exists within the academy. Consider, for example, the relationship which exists between a faculty person and a college or university. The faculty person, having been offered a position, finds most often that he or she is asked to: accept a full-time teaching load with the exact courses to be taught unspecified; encouraged to do research and to publish with the amount of the research and the frequency of publication, or even the certainty of its completion, unspecified; to participate in the usual affairs of an institution, meaning participation in the regular administrative work of the department and the college; to accept committee assignments which may place that faculty person in positions of making judgments on the competence, the performance, and even the future of his colleagues; to participate in the community; and, to do all those things which will better the condition of the institution and the faculty person's own professional career. It seems impossible to spell out all the conditions, the expectations, and the requirements of all the relationships between faculty and an institution. The number of expressions of assent and the variety of perspectives reflected from the "contractual" relationship existing between a faculty person and the institution approach the infinite. To be sure, the inadequacies have led in part to collective bargaining arrangements, but rarely have the difficulties of specificity been solved totally in a satisfactory fashion.

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[1] J. Calamari, and J. Perillo, The Law of Contracts, (St. Paul, Minnesota, West Pub. Co., 1970).

[2] *Id.*

Minor examples of the difficulty are those of what happens when a faculty person accepts a position expecting to teach certain courses and finds that, because of the "needs of the institution," services are needed in some other area. That change may not have been specified in the individual contract nor even in the policy regulations of the institution. Is the individual then in a position of having to accede to a request to accept responsibilities other than those for which a contract was issued? Changing course assignments on the part of the institution in order to meet the requirements of students may provide grounds for a shift in the assignments of faculty. Yet one might argue the fine points of the meaning of the contract in terms of the specific wording of the contract to settle the unwillingness of a faculty person to accept such reassignment.

A useful and well-honored definition of a contract is that offered by Williston who has said, "A contract is a promise or a set of promises for breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty."[3] Williston dispells some of the ambiguity of the meaning of the term "promise" by noting that promises made in a contract are expected of fulfillment by both parties not only in terms of the "physical manifestations of that assurance by words" but by a "moral duty to make good the assurance by performance." Beyond that there is the clear understanding that if the promise is set forth in words of the contract which create a legal duty, then there is in fact the translation of those promises into a firm and binding legal contract.[4]

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[3] S. Williston, and G. Thompson, Selections from Williston's Treatise on the Law of Contracts, (New York, Baker, Voorhis & Co., rev. ed. 1938).

AUTHORITY TO ENTER INTO A CONTRACT

It is well for department chairmen, deans, and central university administrators to recognize that they must be fully aware of who has the authority to issue a contract for the institution they represent. Typically, the process of interviewing applicants reaches the stage of offering a position to an individual. At that point the question arises frequently on the part of the successful candidate as to whether or not an offer has been firmly made and will be honored. Occasionally, someone at the department chairman or dean's level even will have written to the individual being offered a position something like,

> We are pleased to offer you the position of assistant professor for the academic year 1976-77 at a salary of $18,000 effective September 13th, 1976, etc.

If the successful applicant writes back accepting offer, a question arises as to whether in fact a contract has been entered into by the institution and the successful applicant. The answer it seems at this point is that no contract exists but only the issuance of an offer and the acceptance of the offer. The confusion arises because no word has been given to the applicant that while an offer has been made the ratification of that offer and the issuance of an *official* contract is an act which can be performed only by the specially designated authority of the institution which in most instances is the board of trustees. The board of trustees may have designated, with proper language and action, the president of the institution as the administrator authorized to enter into personnel contracts with staff of the institution, but no other person (neither dean, vice president, nor department chairman) has the *legal authority* to commit the institution to a contract with a faculty person. A contract does not exist until that Board has taken action. Hence, persons of an institution responsible for recruiting new faculty should be advised that in the selection of a candidate and in the making of an offer, they should be communicating clearly that the status of the contract for the individual being offered a position is not official until the board of trustees has taken action or until a letter has been received from the office of the president bearing the president's signature indicating that this is a firm and binding offer. As Williston has pointed out in his discussion concerning agreements preliminary to written contracts, "It is also everywhere agreed that if the parties contemplate a reduction to writing of their agreement before it can be considered complete there is no contract until the writing is signed."[5]

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[4] *Id.* at 2.

At issue, of course, is who is authorized to sign for the institution. The question is raised here only to emphasize the caution which must be exercised by all concerned. Williston refers to language by the New York Court of Appeals indicating,

> where all the substantial terms of the contract have been agreed upon and there is nothing left for future settlement the fact alone that it was the understanding that the contract should be formally drawn up and put in writing did not leave the transaction incomplete and without binding force in the absence of a positive agreement that it should not be binding until so reduced to writing and formally executed.[6]

Williston goes on to point to the differences of opinion in the courts which arise, indicating language from the New Jersey Supreme Court that,

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[5] *Id.* at 27.

[6] *Id.* at 28-29, and n. 31, citing Disken v. Herter, 73 App. D. 453, 77 N.Y.S. 300, Affd. W.O. Op. 175 N.Y. 480, 67 N.E. 1081; Mesibov, Clinert & Levy v. Cohen Bros. Mfg. Co., 245 N.Y. 305.

> if it appears that the parties although they have agreed on all the terms of their contract mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done so long as the contract remains without any acts done under it on either side.[7]

Again the importance to the institution and particularly to the administrator and the faculty person is to have a clear understanding that the only authority for the issuance of a contract in the institution is the board of trustees of the institution or that agency of the institution specifically designated by the board for the issuance of the contract. Until the action is taken in that context, it would seem at least under the language referred to above that as long as no acts had been done on either side there is no contract and since the conditions of employment and the circumstances of remuneration in faculty contracts are set forth in written documents or forms it is reasonable to caution that until that document is offered, signed, and returned, a contract does not exist.

It may be helpful at this point to establish the authority under which the institution is able to offer a contract. Public institutions in the State of Ohio gain their authority for action from state legislation. For example, section 3345.011 of the Ohio Revised Code establishes the definition of a state university and by specific language identifies those institutions which are state universities. Section 3360.03 of the Ohio Revised Code provides for the authority to employ, fix compensation, and remove employees. The language of that section in reference to this university states, in part,

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[7] *Id.* at 28 and n. 30, citing Water Commissioners v. Brown, 32 N.J.L. 504, 510, Quoted with approval in Donnelly v. Currie Hardware Co. N.J.L. 388, 49A. 428, But see McCulloch v. Lake & Risley Co., 91 N.J.L. 381, 103 A 1600.

> the Board of Trustees of The University of Toledo shall employ, fix the compensation of, and remove the president and such number of professors, teachers, and other employees as may be deemed necessary . . . .

Further language in the code locates the authority to make contracts and says, in part,

> the Board of Trustees of The University of Toledo may make and enter into all contracts and agreements necessary or incidental to the acquisition of property for and the operation of such university.[8]

The Board of Trustees, empowered by state legislation to adopt by-laws, has further specified the authority under which contracts for the appointment of faculty may be issued. The Board has said that in the administration of the University the president of the institution is the administrative officer authorized to recommend to the Board of Trustees the "full-time appointments to, promotions of, and dismissals from the instructional and administrative staffs of the University."[9]

Reference is made to this example, repeated in kind in the bylaws of numerous public institutions, to emphasize the point that in the final issuance of a contract it is the board of trustees by its action which makes the issuance of the contract official and that, until that board has acted, the question of whether in fact a contract is in force is a question of law to be decided in the court if the issue arises. Until the board has acted, all the parties to the promises, expectations, and intentions are acting in good faith and only in a court of law could it be determined if they were acting under legal obligations. It is often fortuitous that in the world of academe we can continue to operate with so much good will, understanding, and flexibility as to avoid as much as possible the difficulties which could easily arise if the good intentions of all parties and the understanding of

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8. Ohio Revised Code 3360.04.

reasonable approaches to the situations which come up could not be accommodated except by the strictest adherence to the assumed legalities of these contractual relationships.

While reference has been made to the authority for the issuance of contracts in public institutions and specifically in Ohio and The University of Toledo, it is helpful to note that the private institution holds its charter from the state and that the authority for the actions of the institution are generally provided for in the charter, vesting the power and the authority for the safekeeping of the institution and all acts necessary for that in a board of trustees or similar body. Thus, the line of authority for contracts in the private institution as well as in the public can be traced directly to the political authority which authorizes it.

It is useful next to explore the concept of state action since the issues of procedural and substantive due process, modifications of existing policy, and financial exigency are affected by the concept.

STATE ACTION AT THE INSTITUTION

The principal reason for what appears to be a diversionary consideration from our main topic of faculty contracts into the subject of the concept of state action is to seek some clarification on the point that the protections of the 14th amendment and other constitutional freedoms which have been enjoyed by faculty of public institutions will increasingly be found to apply to faculty employed at private institutions. The importance of the concept is that there has been an understanding until recently that constitutional guarantees did not extend to the private college sector. This is particularly evident in the application of the 14th amendment, which nullifies any state law that abridges the privileges and immunities of the citizens of the United States and further denies states the power to withhold due process and equal protection of the law from any person. As Alexander and Solomon have pointed out,

> The prohibitions of the 14th amendment are directed against state action . . . the departing line between state action and private action is at times vague creating the danger that unconstitutional state action will be shielded by private immunity.[10]

As Alexander and Solomon, in citing Hillman, note,

> Several theories have been advanced to find state action at private universities. The receipt of government funds, the public function of education and state contacts with educational institutions have all been argued as bases for determining the actions of private university administrators that are subject to constitutional restraints.[11]

Recent court cases provide different opinions. In *Winsey vs. Pace College et al.* the plaintiff argued through counsel "that the college had unlawfully discriminated against her on the basis of sex in denying her employment and that the college acted under color of state law."[12]

Her claim was supported in her argument by the fact that the college received substantial sums of money from governmental sources. The court, while recognizing that the college received those sums, indicated that even so the action taken by the college was not under the color of state law and thus it was not a state action which caused the injury. The court ruled in favor of the college.

A case which is opposite to that finding occurs in the circumstances of *Phyllis Rackin vs. the University of Pennsylvania:*

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9. Bylaws of the Board of Trustees, The University of Toledo, art. 3, Section 2.

10. K. Alexander and E. Solomon, *College and University Law*, 507 (Charlottesville, Virginia, Michie Co., 1972).

11. *Id.*

12. 394 F. Supp. 1324 (S.D. N.Y. 1975)

> A female professor sued the University alleging that she was discriminated against in the terms and conditions of her employment solely on the basis of her sex.
>
> The court rejected the University's contention that the suit cannot be maintained against it since it is a private institution which has not acted under color of state law. Essentially, the University had argued that the professor failed to prove that the Commonwealth was directly involved in the activity which was alleged to be discriminatory, i.e. the tenure, promotion and personnel decisions of the College of Arts and Sciences.
>
> Analyzing the factors comprising the Commonwealth-University relationship, the court found that: the University was one of several "state-aided" institutions of higher education; it received about 25% of its budget funds from the Commonwealth; the Commonwealth was heavily involved in constructing facilities on the campus; the Commonwealth has awarded over $4 million annually in research contracts to the University; the University participates in state scholarship programs; and the University has, at the Commonwealth's urging, accepted a greater share of state residents as students than in the past.
>
> When combined, these factors demonstrate that the Commonwealth has so far insinuated itself into a position of interdependence with the University that it must be recognized as a joint participant in the challenged activity, the court said.[13]

As noted, the possibility of a private college or university being considered in the role of "state action" may be dependent on the amount of involvement that the state has in the operation of the college. That involvement may take the form of relationships resulting from budget funds from the state, the infusion of public tax money in the form of research grants, or construction of facilities on campus. Participation in state scholarship programs, and analyses of enrollments of an institution which show that an increasing portion of the students attending are from within the state in which the college is located may add to the credibility of action under color of state law.

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[13] 386 F. Supp. 992 (E.D. Penn. 1974).

Note should be taken of the laws of the State of Ohio as they relate to those possible relationships for private colleges which might result in their being considered involved in state action.

The powers and duties of the Board of Regents for the State of Ohio are spelled out in the Ohio Revised Code and include responsibilities to,

> Make studies of state policy in the field of higher education and formulate a master plan for higher education for the state considering the needs of the people, the needs of the state, and the role of individual public and private institutions within the state in fulfilling these needs.
>
> Report annually to the governor and general assembly on the findings from its studies and the master plan for higher education for the state . . .
>
> Seek the cooperation and advice of the officers and trustees of both public and private colleges, universities and other institutions of higher education in the state in performing its duties and making its plans, studies, and recommendations.[14]

An additional section of the Ohio Revised Code says in part that,

> Colleges, universities and other institutions of

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[14] Ohio Revised Code 3333.04.

> higher education which receive state assistance but are not supported primarily by the state shall submit to the Ohio Board of Regents such accounting of the expenditure of state funds at such time and in such form as the board prescribes.[15]

And further that,

> It is the declared policy of this state that the availability of eminent domain on behalf of educational institutions of higher education is in the public welfare. A private college, university, or other institution of higher education that has an endowment fund of less than $12,500,000 may therefore apply to the Ohio Board of Regents for the right to appropriate property when such institution is unable to agree with the owner or owners of the subject property upon the price to be paid therefore.[16]

These identifications of the interests of the Ohio Board of Regents in the functions of private colleges and with the availability of Ohio Instructional Grant money to students of private colleges may, along with other circumstances surrounding any particular possible litigation, provide enough descriptors of the involvement of the state in the affairs of a private institution to permit the application of the constitutionally guaranteed freedoms provided for in the 14th amendment to faculties of private colleges.

An informative article on the subject of state action and private higher education is provided by Hendrickson.[17] He points out, after reviewing selected cases, that there are several legal theories suggesting that the state action doctrine be applied. One identifies the receipt of financial aid and certification of programs.[18] The identification of a public institutional purpose in conjunction with formal state ties is another.[19] Hendrickson cites Horowitz and also Van Alstyne and Karst[20] in identifying that a "balancing of the interests of the private corporation against those individual rights that have been denied" might be a cause for consideration of state action in that "in education where the private institution was offering programs not available in the state's public sector the individual's interest exceeded those of the private institution and the state action doctrine was applied."[21]

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[15] Ohio Revised Code 3333 07.

[16] Ohio Revised Code 3333.08.

[17] Hendrickson, *"State Action" and Private Higher Education*, 2 J. Law & Ed., 53 (1973).

The intent has not been to focus solely on the matter of state action but to draw the attention of the concerned administrator in the private college or university to the understanding that as one discusses financial exigency, due process, and modifying institutional policy, increasing attention may be given to the application of state action doctrines to private college administration. The Hendrickson article supplies excellent information. The principles it calls to our attention need to be kept in perspective in view of recent federal court decisions as in the case of the previously mentioned *Rackin vs. the University of Pennsylvania.*[22] The leading arguments which may support the application of state action involvement to the private institution then become identified as:

(1) Private colleges owe their existence, incorporation, and

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[18] *Id.* at 53 and n. 4 citing O'Neil, *Private Universities and Public Law*, 19 Buffalo L. Rev. 155 (1970).

[19] *Id.* at n. 7 citing Lewis, *The Meaning of State Action*, 60 Columbia Law Review 1083 (1960).

[20] *Id.* at 54 and n. 8 citing Horowitz, "The Misleading Search for State Action under the 14th Amendment", 30 S. Calif. L. Rev. 208 (1971); Van Alstyne and Karst, "State Action", 60 Stan. L. Rev. 3 (1961).

[21] *Id.* at 54.

[22] 386 F. Supp. 992 (E.D. Penn. 1974).

authority for operation to the statutes of the states in which they operate.

(2) The state has a regulatory power over the educational programs and the standards to be applied to programs of the colleges. This is particularly true in the instance of teacher education.

(3) Private colleges make use of substantial sums of state money in their student financial aid programs.

(4) The state has made the power of eminent domain available to and in the interest of the private college or university.

(5) The operation of the college or university is essentially in the public interest.

(6) The private institution is part of the state's master plan for higher education.

The Hendrickson article carefully assesses the viability of many of the above points and arrives at a conclusion which suggests strongly that private church affiliated institutions are generally excluded from the various types of statutory relationships with the state. The private church related institutions are clearly private institutions while private non-sectarian institutions assume a quasi-public role.[23]

The importance of the conclusion is to support the contention that higher education may be moving into an era when the judicial review of administrative practices traditionally afforded the public institution may soon be broadened to include an increasing number of private non-sectarian institutions.

FINANCIAL EXIGENCY

A major concern for the college or university in treating faculty contracts within the context of financial exigency is that if the situation arises the institution must be mindful in the first instance of regulation 4-C of the 1968 Recommended Institutional Regulations on Academic Freedom and Tenure promulgated by the American Association of University Professors. That regulation reads:

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[23] Hendrickson, *supra* note 21, at 75.

> Where termination of appointment is based upon financial exigency or bona fide discontinuance of a program or department of instruction, regulation 5 (dealing with dismissals for cause) will not apply . . . In every case of financial exigency or discontinuance of a program or department of instruction, the faculty member concerned will be given notice as soon as possible, and never less than 12 months' notice, or in lieu thereof he will be given severance salary for 12 months. Before terminating an appointment because of the abandonment of a program or department of instruction, the institution will make every effort to place affected faculty members in other suitable positions. If an appointment is terminated before the end of the period of appointment, because of financial exigency, or because of the discontinuance of a program of instruction the released faculty member's place will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and a reasonable time within which to accept or decline it.[24]

Colleges and universities, public and private, which endorse the regulations and principles of the American Association of University Professors in their policies, procedures, bylaws, and regulations affecting their faculties are bound by this statement. The important part of the statement, which places a burden upon the institution in instances of this kind, is the necessity to first establish that a financial exigency exists of such severity that the discontinuance of a program, a department, or a single faculty person is necessitated and holds higher priority over any other reduction in expenditure which might take its place.

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[24] 54 AAUP Bull. 448, 449 (1968).

Interesting case law on this point is found in the Bloomfield College case. The basic facts in that case are that Bloomfield College faced, with what developed into a rapidly deteriorating financial situation, brought on by decreasing enrollment acted to attempt to balance its budget by reducing its staff. In order to reduce the staff, instead of applying administrative measures of not filling positions which open as a result of resignations or other attrition, the college administratively eliminated 13 teaching positions from its instructional organization. In addition, the college eliminated its existing tenure system by notifying the remaining professors that they were on one-year terminal contracts. The American Association of University Professors filed suit on behalf of the affected persons for reappointment to the faculty and further for a declaratory judgment that tenured status is unaffected by the action of the board of trustees.[25]

Regulation 4-C in the AAUP statement of principles referred to earlier[26] had been proposed for revision.[27]

The express purpose of this revision was:

> . . . . to provide more specific procedural guidance in cases resulting from an assertion of financial exigency and to distinguish between those cases and cases of formal programmatic or departmental discontinuance not mandated by financial exigency.[28]

As noted previously the key provision of the regulation, at least in the Bloomfield College situation, is the wording contained in Paragraph C of the revision of regulation 4 which speaks to a "demonstrably bona fide financial exigency which cannot be alleviated by less drastic means." Investigation of the dismissal of the 13 faculty and the change in university policy which abrogated the existing tenure regulations of the college by placing the remaining professors on one year terminal contracts resulted in the AAUP investigating committee reaching the following conclusions:

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[25] AAUP v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 849 (1974).

[26] *Supra* note 24.

[27] *Termination of faculty Appointments because of financial Exigency, Discontinuance of a Program or Department, or Medical Reasons*, 60 AAUP Bull. 411 (1974).

[28] *Id.*

(1) Thirteen members of the Bloomfield College faculty of whom 11 were tenured were dismissed by the administration and board of trustees in flagrant violation of the principles of academic freedom, tenure, and due process as set forth in the 1940 statement of principles on academic freedom and tenure and the official policies of Bloomfield College up to the time of the action calling for the dismissals.

(2) The administration of Bloomfield College has not demonstrated that these terminations of appointment were necessitated by bona fide financial exigency. Appointments made since these actions suggest strongly that other objectives were involved for which a claim of financial exigency was designated to serve as a cover.

(3) The abolition of the existing system of tenure at Bloomfield College by the administration and Board of Trustees in the face of strenuous objection by the majority of the faculty is an unconscionable repudiation of basic principles of academic freedom and tenure to which the overwhelming weight of opinion and practice in American colleges and universities is firmly committed. It merits condemnation in the strongest terms.[29]

The above conclusions of the investigating committee of the AAUP formed the basis of the original suit seeking reinstatement of the dismissed faculty and request for judgment that their tenured status was unaffected by the action of the board of trustees.

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29. *Academic freedom and Tenure: Bloomfield College (New Jersey)*, 60 AAUP Bull. 50, 64 (1974).

The finding of the original trial court was that the financial exigency of the institution was not the bona fide cause for the decision to terminate the tenured faculty members. The trial judge went to some length in his opinion to point out that the administration of the college was in possession of assets which if they had been turned into cash would have eased the financial difficulties of the college and while the appeals court which heard the case on the basis of an appeal filed by the board of trustees of the college in which they sought relief from the judgment of the trial court[30] took the trial court judge to task for his extensive consideration of property assets which the college had available to it which if sold would have considerably eased the financial situation of the college. The trial court was found not to be in error in its ultimate finding in favor of the plaintiffs simply because it had used perhaps a questionable basis for the judgment it reached.[31] The appeals court judge in his opinion went on to point out that

> The existence of the financial exigency per se does not necessarily mean that the termination of tenure was proper. The key factual issue before the court was whether the financial exigency was the bona fide cause for the decision to terminate the services of 13 members of the faculty and to eliminate the tenure of remaining members of the faculty.[32]

The conclusion of the appeals court judge was that the trial judge was correct in his finding for the plaintiff in the original case and the appeals court supported the trial court's finding. The result of the original case and the appeal established that the dismissal of the 13 faculty persons, 11 of whom were tenured, and that the abolition of tenure status at Bloomfield College were improper and further that the reason given by the college administration and board of trustees of financial exigency was not a bona fide reason to void the college's obligations to its faculty. Thus, the terminated faculty were reemployed and tenure status was reestablished.[33]

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[30] American Association of University Professors, Bloomfield College Chapter v. Bloomfield College, 136 N.J. Super. 442, 346 A.2d 615, 616 (1975).

[31] *Id.* at 617.

[32] *Id.*

The major concern related to faculty contracts demonstrated in this case is that in that instance where the termination of a faculty person's relationship with the university is specifically covered by language in the regulations and policies of administration adopted by the university and wherein the university or college makes use of the wording of that regulation as it relates to financial exigency that the institution must be certain beyond all doubt that the financial exigency is in fact bona fide and the sole cause for the termination. Stepping aside from that rather strict line of reasoning, and reverting for a moment to the opinion of the charge in the original trial, it would appear that, even though the appellate court found the trial judge's basis for reasoning in error, the line of reasoning which the original trial judge used in suggesting that there were other assets which could be tapped by the college to overcome the necessity of solving the institution's financial problems by termination of faculty might well be one which should serve as a caution to the administrations of other institutions. As Leder points out,

> Through the use of precisely defined terms such as "financial exigency" and "extraordinary circumstances" the court was able to determine whether the teacher's rights were infringed by the abolition of tenure. The contract therefore provided the court with an adequate framework within which to ascertain and protect the rights of the teachers.
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> If however the contract does not precisely define the rights of the parties then the adequacy of the contractual protection is effectively diminished.[34]

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[33] Leder, "Economically Necessitated Faculty Dismissals as a Limitation on Academic Freedom", 52 Den. L.J. 911, 932 (1975).

[34] *Id.*

A further interesting case is examined extensively by Leder.[35] In this case of *Johnson vs. the Board of Regents of the University of Wisconsin System*, we find that the Wisconsin legislature had reduced the budgetary allocations for the University of Wisconsin System by 5 percent for the period 1973-75 and required a decrease in enrollment in the system's campuses. Administrative officials of the system, in order to balance the budgets in the face of these reductions, decided, in the face of apparent insufficient funds, to discontinue the employment of some tenured faculty. After following a procedure which had been established for identifying faculty to be discontinued, the university laid off 38 tenured faculty. These persons then brought action seeking declaratory relief. They claimed that the university's method of determining which faculty would be terminated violated the procedural due process guaranteed them by the 14th amendment. They relied on a Wisconsin statute which in part provided that a teacher's "employment shall be permanent during efficiency and good behavior."[36] It states further that a teacher's employment "may not be terminated involuntarily except for cause upon written charges." The basis of the plaintiffs' request for relief from discontinuance of their employment was that the termination of their employment deprived them of a property right without due process of law for there had been neither "written charges nor allegations of inefficiency or bad behavior."[37] Even though the statutes of the state provided for the continuance of a faculty person in the absence of inefficiency or bad behavior or cause based upon written charges and even though none of these were present in the instance of the termination of the plaintiffs, the Wisconsin Supreme Court,

> applied the minimal due process requirements that underly the statutes procedures and held that the 14th amendment required only protection from

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[35] *Id.*

[36] *Id.* at 923 and n. 65 citing Wisc. Stat. Ann. Sec. 37.31 (1974-75 Supp.).

[37] *Id.* at 923.

> "termination or layoff for a constitutionally impermissible reason" and from termination or layoff which is wholly arbitrary and unreasonable.[38]

As Leder goes on to point out,

> The property interest of the Wisconsin teachers was by administrative fiat limited by the edition of a new cause for dismissal — declining student enrollment and legislative paring of the budget.[39]

The analysis by Leder shows that in order for the plaintiffs in the Johnson case to have had any chance for success they would had to have been able to prove that the decision for their dismissal was "wholly arbitrary and unreasonable." This was impossible "because the underlying basis for the decision - the economic reduction in staff - meant that the decision could not possibly be wholly arbitrary."[40]

As a result, one can draw the conclusion that an administration seems empowered to do what it must so long as its actions are not wholly arbitrary and unreasonable.

The importance of the Johnson case in the matter of faculty contracts and their major concerns is that in the opinion of the district judge, later supported by the state supreme court, are spelled out what are considered to be the minimum procedures for protection against procedural due process errors in relation to the failure to reappoint faculty persons, namely,

(1) Furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to layoff.

(2) Furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at.

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[38] *Id.* at 927 and n. 80 citing 377 F. Supp. at 239.

[39] *Id.* at 928.

[40] *Id.* at 929.

(3) Making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision makers had relied and

(4) Providing each plaintiff the opportunity to respond.[41]

The trial court's opinion also included the following language:

> My basic conclusion is that so far as the 14th amendment is concerned a tenured teacher in a state institution is protected substantively so to speak only from termination or layoff for a constitutionally impermissible reason (such as earlier exercise of first amendment of freedom of expression or race or religion) and from termination or layoff which is wholly arbitrary or unreasonable. The 14th amendment requires only those procedures which are necessary to provide the tenured teacher a fair opportunity to claim this substantive protection. In defining these minimally required procedures the courts must take into account not only the interest of the teacher but the institutional context.[42]

The carefully structured procedures for the protection of the faculty person's rights under contract for services to an institution as spelled out in the bylaws and regulations of the institution are the flesh and blood of the context referred to in the court's opinion in the Johnson case. The importance which must be attached to the Language of those rules and regulations, the clarity of their meaning, and the accuracy of their application cannot be overemphasized.

The intensity with which the result of an institution's action affecting individual faculty as a result of financial exigency is emphasized by further language in the opinion of the court in Johnson where the court says that,

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[41] Johnson v. Board of Regents of the University of Wisconsin System, 377, F. Supp. 227, 240 (1974).

[42] *Id.* at 239.

> . . . I am not persuaded that after the initial decisions had been made the 14th amendment required that plaintiffs be provided an opportunity to persuade the decision makers that departments within their respective colleges other than theirs should have borne a heavier fiscal sacrifice; that non-credit producing non-academic areas within their respective campus structures should have borne a heavier fiscal sacrifice, that campuses other than their respective campuses should have borne a heavier fiscal sacrifice, or that more funds should have been appropriated to the university system.[43]

The implications for faculty contracts in administration in an institution are extremely clear as a result of the Johnson case: where, within the context of financial exigency, all of the procedures necessary to protect the faculty person against invasion of the substantive protection of the constitution have been taken, and where those procedures classified as minimally required to provide procedural due process protections are present, then an administration is empowered to do what it must to reconcile its operations with the financial exigency so long as its actions are not wholly arbitrary and unreasonable.

MODIFYING EXISTING POLICY

A case which has attracted much attention recently is that of Professor Rehor of Case Western Reserve University. Matthew W. Finkin, associate professor of law at Southern Methodist University, has provided an excellent analysis of that case and its implications for faculty contractual relationships with universities and the implications for modification of policy. The information which follows is drawn from Professor Finkin's analysis.

Professor Rehor had been a member of the faculty at

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[43] *Id.* at 239.

Cleveland College for 13 years when that college was absorbed by Western Reserve University in 1942. He was granted tenure by 1948. The university's faculty personnel policies provided that tenure would be in accord with the 1940 statement of principles of academic freedom and tenure of the AAUP and the Association of American Colleges. An important point in the policies of the institution was that the bylaws of the Board of Trustees allowed it to modify its rules governing faculty appointment and tenure. Western Reserve University merged with the Case Institute of Technology in 1967 and while retirement age at Western Reserve was 70 years of age, it was 65 at Case. Faculty committees were formed to recommend a uniform retirement policy and the board of Case Western Reserve in 1969 accepted the recommendations of the faculty committee on a revised uniform retirement policy. As a result of that action, Professor Rehor's retirement age was adjusted to 68 years of age instead of 70 but with continuance after the age of 68 at the discretion of the University. Informed in July 1970 that his retirement would be mandatory on June 30, 1973, Professor Rehor filed suit in contract in 1971.[44]

The tracing of the findings of the trial court, the appeal court, and the Ohio State Supreme Court are of major interest.

As Finkin indicates,

> The trial court held that the university's board of trustees had reserved the power to modify the university's retirement policy and that Professor Rehor's contract incorporating the board's reserve power incorporated as well the now modified policy. Thus it concluded that his retirement was not in breach of contract.[45]

The case was appealed by Professor Rehor and the appellate court reversed the trial court's finding.[46] The appeals court said,

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[44] Finkin, "Contract, Tenure and Retirement: A Comment on Rehor v. Case Western Reserve University", 4 Human Rights 343, 344 (1974-75).

[45] *Id.*

> An award of academic tenure vests a university faculty member with the right to continued reappointment to the faculty unless sufficient cause is shown for his termination.[47]

The court said further that,

> Where a faculty member is awarded tenure by a university and the faculty bylaws of the university at that time state that the mandatory retirement age for faculty is 70 years such provision in the faculty bylaws becomes a binding term of the faculty member's employment contract with the university, the faculty member has a vested right to be reappointed to the faculty to age 70, and the university cannot thereafter lower the faculty member's mandatory retirement age without abridging the employment contract.[48]

Of additional importance to the interested administrator and faculty person was the further conclusion of the appeals court:

> that the reduction in 'vested contract rights' was effected unilaterally by the university without the faculty member's assent and without consideration.[49]

The issue reached the Ohio Supreme Court with the attorney general of Ohio filing an amicus curiae brief on behalf of several of Ohio's public universities. A basic concern in that brief was to point out:

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[46] *Id.* at 345 citing Rehor v. Case Western University, Case No. 33395 Syllabus of the Court, Proposition No. 1, (Ohio Ct. App., 8th Dist. July 25, 1974).

[47] *Id.* at 345 and n. 4.

[48] *Id.* at 345 and n. 5.

[49] *Id.*

> The Court of Appeals' decision presents a governing body with two unacceptable alternatives. The board must either: (1) adopt a policy which will last for time immemorial, oblivious to changed conditions; or, (2) adopt a different policy for each employee, or for small groups of employees, thus fostering at least the appearance of unequal treatment, and creating real administrative chaos for the university.[50]

As Finkin points out:

> the Ohio Supreme Court repudiated the notion that tenure yields the right of continuance until dismissed for just cause.[51]

Finkin quotes the Ohio Supreme Court opinion:

> Academic tenure does not in the manner expressed vest a faculty member with the right to continued reappointment to the faculty and we so hold. A vested right is a right fixed, settled, absolute and not contingent upon anything. Such is not the case here.[52]

Just as the appeals court decision had sent sharp tremors through the world of administration in higher education so the finding of the Ohio Supreme Court may be sending sharp tremors through the world of faculty and their understandings of contractual relationships with institutions. The key points seem to be that so long as a university's changes in policy and procedure are reasonable, are uniformly applicable, and follow agreed upon processes for change that the institution has the authority to modify its existing policies. The key characteristics of that change are the reasonableness of its effect, the uniformity of its application, and the validity of the authority under which the change is effected. Acting under the guidance of the above principles it would appear that the deliberations in the Rehor case and the ultimate finding of the Ohio Supreme Court indicate that at present a board of trustees has reserved powers which permit it to modify the policy of the institution's operation in relation to faculty contract policy.

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[50] *Id.* at 346 and n. 8 citing Brief for Bowling Green State University, et al, as Amicus Curiae at 19, Rehor v. Case Western Reserve University, 43 Ohio St. 2d 224, 331 N.E. 2d 416 (1975).

[51] *Id.*

[52] Rehor vs. Case Western Reserve University, *Supra* Note 46.

Finkin in his analysis of the case and its treatment in the several courts arrives at his own conclusions about the appropriateness of the final decision. One gathers from his analysis that had he been the Supreme Court he would have found differently from the opinion concluded by the court for he, after making reference to several of the fine points of the case, says,

> thus the irony of Rehor is that a court which strove to preserve administrative flexibility against a perfectly valid contract claim will only add to the growth of far more radical and perhaps less flexible means of job protection.[53]

The extent of the reserve powers of a board of trustees will undoubtedly continue to be tested in the courts as conditions in higher education which change so rapidly create situations which individuals will feel need to be corrected by litigation.

ADMINISTRATION AND "THE LAW"

There was a time in higher education when the chief counsel to the president of a university was the dean of the college representing the primacy of academic programs. This emphasis of presidential counsel existed until the mid 1950's when it became apparent that the chief advisor to college presidents might need to be the business manager, treasurer, or vice president for financial affairs. There is a growing awareness that the increasing attention being given to legal matters by college presidents will bring us into an era when perhaps the chief counsel to the president will be legal counsel.

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[53] Finkin, *supra*, note 44, at 356.

With that in mind the university administrator may do well to keep before him an understanding of the two schools of jurisprudence. The administrator increasingly asks himself, "What is the law?" wanting to be sure of his ground before recommending or taking action. One school of law is described by Calamari. He says,

> The positivist usually believes that the legal system may be analyzed into component rules, principles, and concepts and that any fact situation may be solved by the careful pigeonholing of the facts into the appropriate legal concepts, principles and rules. In other words, once the facts are determined a carefully programmed computer would produce the correct decision.[54]

Calamari also describes the opposing school of law identified as the realist school. He cites other authority to begin his definition indicating that,

> The law with respect to any particular set of facts is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence.[55]

Calamari goes on to say that,

> The realist is skeptical of the formulation of generalizations and definitions. He believes the courts in reaching a decision do in fact and should take into account the moral, ethical, economic and social situation in reaching a decision.[56]

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[54] Calamari, *supra* note 1, at 7.

[55] Calamari, *supra,* note 1 at 8 and n. 22 citing Frank, Law and the Modern Mind Pg. 46 (1930). See generally, Savarese, "American Legal Realism," 3 Houston L. Rev. 180 (1965).

[56] Calamari, *supra,* note 1, at 8.

In view of the increasing number of cases involving faculty contracts reaching the courts and in view of the differences in the opinions offered by the several courts based upon the different sets of circumstances represented by each of the separate cases, it would appear that the administrator is increasingly placed in a position of truly not knowing what the "law" will be in a particular circumstance until a case has been decided in court. Everything prior to the court decision is the acceptance of statute and precedent establishing court cases as the accepted law and in that sense the positivist school of law represents a rational structure of regulations under which an institution can operate.

CONCLUDING STATEMENT

The major concerns associated with faculty contracts are ever on the mind of administrators and faculty alike. Those concerns are:

1. The assurance that a bona fide contract has in fact been created through the exercise of proper legal procedures and that the offers, promises, and conditions of the contract have been properly approved by the authority of the institution authorized to enter into contracts.
2. That administrators in private institutions need to carefully assess their positions in relation to the concept of state action and to seek definitive explication of the degree of state involvement in the affairs of these institutions which would be sufficient to bring the protection of constitutional freedoms now afforded faculty in public institutions to those operating in private institutions.
3. That where colleges and universities may need to modify their personnel policies that, while recognizing their legal right to do so, they proceed with such modification in a careful and systematic fashion which clearly documents that the modifications have benefitted from the deliberations of faculty as a body and do not represent unilateral and arbitrary actions of administration.

4. The establishment of financial exigency as a reason for the termination of faculty while within the authority of the governing body of an institution needs to be so carefully constructed that it represents a bona fide financial exigency and not a mask for other reasons.

The issues associated with faculty contracts are numerous enough to provide for constant attention to detail by all administrators and indeed the faculty involved. While attention has been focused in these comments chiefly on the protections afforded faculty, there are major concerns of the institution associated with faculty contracts which require careful analysis. While the interest has been in protecting the interest of faculty in the matter of contractual relationships with an institution, the whole area of protecting the interest of the institution in its relationships with the faculty is one which I suggest will receive considerably greater attention in the near future as higher education continues to move into an era of greater questioning and scrutiny by agencies beyond the campus.

IV

DUE PROCESS FOR STUDENTS: CONVERTING LEGAL MANDATES INTO WORKABLE INSTITUTIONAL PROCEDURES

Virginia B. Nordby

> The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.

These words from the 1961 decision of *Dixon* v. *Alabama Board of Education* (294 F.2d, 50, 5th Cir. 1961) undoubtedly enjoy widespread assent within the educational community. The logical consequence of them, however, presents significant problems for educational administrators. The court continued:

> Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law . . . due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.

Since *Dixon,* the requirement of notice and a hearing has been extended not only to permanent expulsion, but also to temporary suspension or removal, involuntary transfers, exclusion from extra-curricular activities, and various special placements. It now seems clear that almost any punitive or disciplinary action taken as a response to alleged student misconduct must be preceded by notice and a hearing consonant with the requirements of due process. Although the conduct involved in *Dixon* might be characterized as tortious or criminal, the requirement logically extends to academic misconduct as well. This seems especially clear since the recent Supreme Court decision in *Goss v. Lopez* in which the Court endorsed the principles developed in *Dixon* and by other lower courts and outlined in some detail the nature of the protected student interests.

> The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause.
>
> The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the clause must be satisfied. (citations omitted) . . . It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

Goss v. *Lopez* involved disruptive high school students, but the impact of the decision on post-secondary institutions seems clear. If minor students have a protected liberty interest in their good name and reputation which is jeopardized by charges of criminal disruption or the breach of high school codes of conduct, surely university students have a similar interest which is similarly jeopardized by charges of cheating or plagiarism. Under *Goss* it appears inevitable that public institutions of higher education must provide for notice and a hearing before students are expelled, suspended, or otherwise disciplined for misconduct of any kind.

As the full impact of these Constitutional requirements was filtering through the educational community last year, another dimension to the problem was added by the Department of Health, Education, and Welfare's regulations on Title IX of the Education Amendments of 1972. Under the final version of these regulations which became effective on July 21, 1975, all institutions, public or private, which receive federal financial assistance must adopt and publish grievance procedures by which students may challenge the institution for alleged sex discrimination in violation of Title IX. Another set of federal regulations developed under the Family Education Rights and Privacy Act (The Buckley Amendment) require institutions to provide a hearing procedure for students to challenge the accuracy of their school records. And finally, the national publicity surrounding alleged wholesale violations of Honor Codes at the military service academies has caused many educators to ponder a-new their own expectations for student conduct and their own responsibilities for the fair treatment of students.

How can an educational institution convert these concerns and the requirements of the law into a set of rules and procedures which will protect the rights of students and also serve the educational purposes of the institution? A variety of models are possible, but for each there are similar legal and administrative issues which must be addressed. The size and administrative organization of an institution will greatly affect the type of procedures which will be adopted. The role and stance of the faculty will also affect the procedures. The traditions of the institution, its past experiences, its penchant for legalisms or "flexibility," the practices of its peer institutions, and numerous other imponderables will determine the final course. But always there will be the bottom line to keep in mind: what are the minimal requirements of the law?

There are two basically different types of procedures relating to students and it is probably wisest to keep them separated, both for purposes of discussion and in implementation. The first is the procedure which must be utilized when an institution is bringing a charge against a student, when disciplinary action against a student is being considered, or when a faculty member or administrator suspects a student of misconduct. I will call these Disciplinary Procedures. These Disciplinary Procedures are brought by the institution *against* the student. A second type of procedure, on the other hand, is brought by the student *against* the institution or one of its agents (*i.e.*, faculty). I will call these Grievance Procedures. It is wise to keep these procedures separate because there are different legal and due process requirements and very different administrative concerns applicable to each of them.

Whether we are dealing with Disciplinary or Grievance Procedures there will be five major categories of problems which must be considered for each. First, an institution should be careful to understand its purpose in providing either procedure. Second, care should be devoted to stating rules of conduct and rights of students which will constitute the criteria to be applied in individual cases. Third, various administrative and political issues must be taken into account in settling upon the authoritative decision-maker in student rights cases. Fourth, the requirements of procedural due process must be translated into a useful set of procedures. And finally, care must be given to several issues concerning the penalty or remedy which a hearing body might impose or recommend.

Purpose

As a practical matter, an institution provides Disciplinary or Grievance Procedures because it is required by law to do so. A sense of fair play toward students might also impel an institution to go beyond the minimal legal requirements. More importantly, however, an institution must have a clear notion of the goal it seeks to achieve by imposing discipline upon a student. A public institution must restrict its actions to proper governmental purposes. Its disciplinary decisions must have some rational relationship to such proper purposes. When students are disciplined for breach of the peace or other disruptive conduct, the purpose of the institution is clear and beyond suspicion, namely to protect other students and to maintain "the orderly operation of the college in general." (*Dixon* v. *Alabama*). But what is the proper governmental purpose in disciplining for academic misconduct such as cheating? Fairness to other students, protection of the quality of the degree, institutional honesty in certifying its graduates as educated persons would all be acceptable answers. Is it appropriate to discipline for the purpose of encouraging certain character traits such as scholarly or professional demeanor or attitude, to encourage cooperation or to discourage emotional instability? Is it proper to discipline for wholly punitive reasons? In struggling with these questions in recent years, some institutions have decided to rely almost exclusively on the civic law enforcement agencies for dealing with students engaged in non-academic misconduct. Beyond that, institutions should try to articulate their institutional goal in imposing discipline for academic misconduct.

Grievance Procedures which allow students to bring charges against the university could well be viewed by students as offering a chance to "bring down" a particularly disliked faculty member or administrator. It is very unwise, legally and administratively, to allow these procedures to serve such a purpose, and some care must be taken formally to protect faculty from harassment by the filing of numerous frivolous student grievances. The main institutional goal in providing students with Grievance Procedures is to give the institution a mechanism for quickly identifying and correcting its own mistakes. Orderly Grievance Procedures also protect trustees and other high officials from the importunings of individual students who feel they have been treated unjustly but have no "channels" available for complaining. Finally, institutional student Grievance Procedures may forestall judicial interference in the educational operation of the university.

Criteria

If students are to be disciplined and if faculty or staff are to be overruled by appeals committees, the institution has an obligation to make clear, in advance, the rules it will apply. Earlier courts were reluctant to interfere with the judgment of educational authorities, particularly when exclusively educational standards were involved. But numerous cases, particularly at the elementary and secondary level, have almost completely eroded the judicial hands-off attitude. Now the traditional requirements of substantive due process apply as much to school rules as to any other administrative or statutory regulation. The landmark statement of the legal requirement was in *Connally* v. *General Construction Co.* (269 U.S. 385, 1926).

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process.

Applying these principals to an educational institution, a Federal District Court in Wisconsin once noted:

> The constitutional doctrines of vagueness and overbreadth are applicable, in some measure, to the standard or standards to be applied by the university in disciplining its students, and that a regime in which the term 'misconduct' serves as the sole standard violates the Due Process clause of the Fourteenth Amendment by reason of its vagueness, or, in the alternative, violates the First Amendment as embodied in the Fourteenth by reason of its vagueness and overbreadth.

Little can be said of a standard so grossly overbroad as 'in the best interests of the school.' *Soglin v. Kauffman,* 295, F. Supp. 978 (W.D. Wis. 1968).

In drafting rules and regulations which are to be enforced by disciplinary action, institutions must seek to set out objective standards by which a student can measure his behavior and by which an administrator can effectively function in evaluating behavior. It is also essential that students be adequately informed of the rules and even given orientation or training if that is indicated because of the complexity of the rules (*i.e.*, elaborate Honor Code or standards of professional ethics) or because of the heterogeneity of the student population (*i.e.*, foreign students with different value structures).

In Grievance Procedures brought by students against the institution the "void-for-vagueness" issue is not such a major problem because discipline and infringement on liberty or property interests are not the intended outcome of such proceedings. Moreover, most such procedures are intended to remedy violations of legal requirements, such as anti-discrimination laws, rather than University-drafted rules about faculty responsibilities. Nonetheless, the vagueness and over-breadth problems should not be ignored. Occasionally, the student Grievance Procedures unintentionally state criteria in the course of listing the jurisdiction of the hearing panel, *i.e.*, "These procedures may be used in cases of alleged improper conduct of a faculty member." In the absence of some other document defining improper conduct and in the absence of a violation of a substantive law, such a statement could be found unacceptably vague.

The challenge of drafting rules that are not unconstitutionally vague is a major administrative problem. Of course, it is extremely difficult to get agreement within the educational community. More importantly, there are pitfalls in too great a departure from vagueness. The more specific the rules and the more precisely honed the statement, the greater the loss of that flexibility we all require and the greater the danger that some important item has been forgotten.

Choice of Decision Maker

In a Disciplinary Procedure involving charges against a student, due process requires that there be an impartial decision-maker, one who has no direct personal interest in the outcome of the case. This would mean that the disciplinarian may not be the accuser, or anyone related to the accuser or the accused. It does not mean, however, that the decision-maker must be outside the system or a peer of the accused. In *Goss* v. *Lopez,* for example, the Court assumes that the school principal would be a proper decision-maker if a teacher were an accuser.

Student honor councils established to enforce honor codes are characterized by the courts as formal accusatory bodies similar to grand juries. It is important that these student groups not have the final decision-making authority. Careful faculty or administrative review must be given to all discipline recommended by student groups. When students sit on general disciplinary or grievance hearing panels, it is important that their proportionate number not be high enough to give them control of the decision.

When an educational institution establishes procedures for dealing with students, whether they be Disciplinary or Grievance Procedures, the choice of an individual or group to make the final decision is one of the most vital elements of the process. Each institution will have various organizational and political factors to consider. The size of the decision-making body should be carefully decided. It seems appealing to have representation from various groups, but the larger the size, the harder the scheduling of meetings, the longer the debates over language, the more diffuse the issues. The need for reasonable speed is the highest priority and should dictate the size of the panel. In addition, care should be taken to assure panels which will respect the confidential nature of proceedings involving the name or reputation of either students or faculty. If an institution has a diffuse or decentralized system of governance, it may choose to rest the decision-making responsibility in the various units; but it would then be necessary to establish some mechanism for assuring uniformity and consistency. It is possible to establish a system whereby the hearing panel performs only an advisory function and the final decision, based on the evidence received by the hearing panel, is made by a higher authority. Such a system is better suited for Grievance Procedures because the requirements of procedural due process are not so great in those situations. Another factor which institutions should consider in establishing panels or committees or other hearing bodies to deal with these matters is the need for persons with expertise to serve on these bodies. Expertise can be developed by hearing a variety of cases over an extended period of time, by receiving training from persons knowledgeable in grievance handling, or by reviewing the records of previous cases decided by others. Large institutions with a great number and variety of cases might find it desirable to employ a screening officer to decide if cases are frivolous or with merit, to assign them to the proper unit and committee, and to assure promptness in their resolution. Such a person could also provide a certain continuity and expertise to the process.

Procedural Due Process

Unfortunately, there is not a clear-cut answer to the disarmingly simple question: what kind of procedure does the concept of due process require? Courts have frequently noted that due process is "an elusive concept" whose "content varies according to specific factual contexts." (*Hannah* v. *Larche*, 363 U.S. 420, 442, 1960). In *Goss* v. *Lopez* the Supreme Court noted that the interpretation and application of the Due Process Clause does not involve inflexible procedures applicable to every imaginable situation. Rather it necessitates a practical assessment of the "competing interests involved." "The student's interest is to avoid unfair or mistaken exclusion from the educational process . . ." The schools, being "vast and complex," are properly concerned about "prohibitive cost or interference with the educational process." In attempting to outline "certain bench marks to guide us," the Supreme Court has firmly announced that "The fundamental requisite of due process of law is the opportunity to be heard" (quoting from

Grannis v. *Ordean,* 234 U.S. 385, 394, 1914). "At the very mimimum" this demands "*some* kind of notice" and "*some* kind of hearing."

In the university context the due process mandate is substantially greater in Disciplinary Procedures where the student interest at stake is his continuance in his educational program. In these cases, the full panoply of due process guarantees should be employed. At the other end of the continuance are Grievance Procedures giving administrative review to a student complaint about some routine institutional action. In these situations, an informal opportunity to be heard might often be adequate.

At the very least due process requires:

- notice of the charge or complaint and the facts which support it
- non-prejudicial time intervals
- a hearing at which there is an opportunity to answer the charges or explain a position
- impartial decision-maker.

Additional components which might be added, depending on the balance of competing interests, are:

- the right to confront and question the accuser
- the right to call and cross-examine witnesses
- representation by legal counsel
- a record of the hearing
- a decision based solely on the evidence at the hearing.

The best statement of the due process requirements for colleges and universities remains that offered by the court in *Dixon* v. *Alabama:*

> For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to

expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the board of education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college.

By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the board or administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the board directly, the results and findings of the hearing should be presented in a

> report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.

Although courts clearly are willing to be flexible about the components of due process which they will require in any particular case, educational institutions are faced with the necessity of drafting procedures which will be generally applicable. They surely cannot rely upon non-legally-trained administrators to invent for each case a procedure which strikes the proper balance between the competing interests in that particular case. It would seem wisest to keep the Disciplinary and the Grievance Procedures separate and try to make the Grievance Procedures as flexible and informal as possible. The Disciplinary Procedures also should be kept flexible, but clearly they must be considerably more formal, with special provisions for time limits and the content of the notice, and the conduct of the hearing, etc. In drafting procedures the goal is to find a middle ground which balances simplicity and flexibility, on the one hand, and formality and specificity, on the other. The hazards of too-elaborate procedures are obvious. They must be followed to the letter and failure to do so can produce additional legal problems for the institution. Following elaborate procedures when it is not necessary to do so can be very expensive in faculty and administrative time. Elaborate procedures which confuse or intimidate the parties encourage the involvement of attorneys as well as polarize the parties and discourage informal settlements. On the other hand, the hazards of too-simple procedures are also great. Obviously, from the student's point of view, they may deny full due process. But from the institution's point of view they might also be a problem. If basic safeguards are not guaranteed, the institution's good will is suspect among all who deal with it, including a court which might later be considering a case involving over-simplified procedures. Laymen often lack an intuitive understanding about what due process involves. Hearing panel members may become involved in pointless debate and general confusion about how to proceed if the written procedures are not specific. This can produce delay and misunderstandings detrimental to all concerned. In such a case, the faculty member involved could suffer as well as the student. Finally, too-simple a procedure, just as too-complex a procedure, presents the risk that the over-all purpose and goal of the institution will not be served, that errors will not be discovered and corrected. As Justice Powell pointed out in his dissent in *Goss* v. *Lopez* "a truncated 'hearing' is likely to be considerably less meaningful than the opportunities for correcting mistakes already available . . ."

Remedies and Penalties

If a student brings a grievance against an educational institution and a properly constituted hearing panel decides that the student has been improperly treated, what kind of remedy may be ordered or recommended? Written Grievance Procedures rarely deal with this question, and as a result considerable confusion sometimes is generated. Procedures should clarify whether panels can require a change in an unfair or discriminatory policy or practice, or only make whole a student who has been injured thereby, or merely require the appropriate school official to repeat its original decision or activity avoiding the mistake which injured the student. Any ruling in favor of a student is likely to be a ruling against a faculty member and concerns about academic freedom must be kept in mind. The American Association of University Professors takes the position that student grades may be rectified by a departmental committee of experts if a professor's grading evidences bias, inconsistent use of criteria or inappropriate use of criteria. However, many faculty feel that any enforced change of their grading is a violation of academic freedom. An institution should openly resolve this issue before authorizing grievance panels to hear student grade appeals. In general, student Grievance Procedures often involve issues of faculty responsibility and fair treatment of students. Hence, remedies often involve faculty rights and prerogatives. For this reason it is advisable that the final decision-making power in such cases be lodged in a dean or chancellor or other authority who is respected by faculty.

For Disciplinary Procedures against students it is important that institutional rules and regulations indicate the range of possible consequences for violations and that penalties be appropriate for the offense and consistently applied. Far more difficult issues surround the question of what type of disciplinary actions will call forth the due process hearing requirements. Clearly, notice and hearing are required before imposing the penalty of expulsion for misconduct. Must there be notice and hearing before a student is given a failing grade for cheating on a test or plagiarizing a term paper? The logic of *Goss* v. *Lopez* surely requires it. Justice Powell stated in that case: "No one can foresee the ultimate frontiers of the new 'thicket' the Court now enters." Citing such matters as how to grade a student's work, whether a student passes or fails a course, whether he is required to take certain subjects, whether he may be excluded from athletics or other extra-curricular activities, Justice Powell suggested that "the Court will now require due process procedures whenever such routine school decisions are challenged." It would seem clear that decisions about such matters which are based on suspected misconduct, such as cheating, do indeed have to be preceded by notice and hearing. However, decisions about such matters which are based on academic achievement and performance apparently do not yet call forth the due process procedures. This interpretation was recently endorsed by the Court of Appeals for the Fifth Circuit in *Srisuda Mahavongsanan* v. *Roy M. Hall* (Dkt. No. 75-3146, March, 1976). "The due process requirements of notice and hearing have been carefully limited to disciplinary decisions. Misconduct and a failure to attain a standard of scholarship cannot be equated. There is a clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals." Unfortunately, many fact situations come to mind in which the dichotomy is not so clear, for example, a clinical error in a medically-related field may be a sign of both academic failure and negligence (misconduct). Must there be a hearing before assigning a low grade? What of a student's failure to attend class? Is this a "failure to attain a standard of scholarship?" If not, must there be notice and hearing before it may be taken into account in assigning a grade?

What if a student's academic deficiencies are interrelated with emotional instability? Must academic discipline be preceded by notice and hearing? The answer to these questions is not yet clear, although it seems inevitable that the next decade will see an expansion, not a contraction, of institutional obligations to provide hearings.

In conclusion, the Fourteenth Amendment requires public educational institutions to give a student notice and hearing before taking action adverse to the student's interest if that action is based on charges of "misconduct." The behavior encompassed by the word "misconduct" is not yet clear. At the least, it includes overt disruption of the educational process. It also undoubtedly includes academic misconduct, such as cheating and plagiarism. Potentially, its meaning is extremely broad. In *Goss* v. *Lopez* the Supreme Court suggested it might include charges of any conduct which, if sustained and recorded, "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." Because of the uncertainty about the required scope of Disciplinary Procedures, institutions are well-advised to develop comprehensive Grievance Procedures by which students may appeal actions against their interests and receive a fair and impartial hearing. Since institutions are required by Title IX to provide Grievance Procedures for sex discrimination issues, this should be simple to accomplish. When drafting Disciplinary and Grievance Procedures, institutions must carefully weigh various legal and administrative concerns in the five major categories outlined. In dealing with these complex matters, many educators may conclude with Justice Powell that the courts are making a mistake placing such "indiscriminate reliance upon the judiciary, and the adversary process . . ." Hopefully, however, with wise and restrained administrative leadership, the goal of justice for students can be served and the views of the majority of the Supreme Court in *Goss* v. *Lopez* will prove closer to the mark: "we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself . . ."

V

SO YOU'VE BEEN SUED! COMPONENTS OF THE LAWSUIT

Stephen R. Ripps

Lawsuits are not just things that happen to other people. Any of us can be involved in one, as a plaintiff or defendant, in our personal capacity, such as a result of a traffic accident, or in a professional capacity as a faculty member, administrator or trustee.

A lawsuit is an action or proceeding in a civil court. Its purpose is to obtain the determination of a claim or grievance in the form of an enforceable judgment. The lawsuit is based upon the existence of laws granting or denying rights to the litigants, courts and judges to hear the dispute, and officers of the state to carry out the decisions and judgments of the courts. All of this is accomplished within the framework of rules of practice and procedure.

The lawsuit is different from the administrative agency proceeding and the possible judicial review of an agency proceeding or hearing. The administrative agency is created and developed to express an expertise in a given area. Under enabling legislation, the agency promulgates and enforces rules and regulations. Administrative agency hearings are somewhat more informal than court trials. During administrative agency hearings rules of evidence are not adhered to, allowing hearsay testimony to be introduced. However, even at agency hearings the proceedings must conform to due process standards. In cases of violations of due process or arbitrary and capricious actions by the agency, the participant adversely affected may have recourse to the courts through judicial review.

The lawsuit is distinguished from a criminal proceeding in that the person or entity bringing the action does it in a private capacity usually seeking redress in the form of damages (money), while the criminal action is brought by the government (local, state, federal) through the office of a prosecuting attorney which seeks a conviction resulting in a fine or jail sentence, or both, because of the violation of a criminal statute.

The lawsuit is not the same thing as an arbitration hearing. Arbitration is a method of settling a dispute in the first instance in a forum other than the courts. Many commercial (including higher education) contracts now require the parties to submit their disputes to arbitration. The courts have ruled consistently that such agreements are binding, that both parties must submit to arbitration; and that one party may not take the other party to court. Generally, an arbitration is conducted by laypersons named in the arbitration agreement or before a body such as the American Arbitration Association which will designate the arbitrators from a panel of disinterested persons familiar with the business involved. The arbitration award is enforceable by obtaining a court order. A "special proceeding" is brought before the court in the form of a petition to confirm the arbitrator's award. Awards are not set aside by the court except in the case of fraud on the part of an arbitrator. The court's action as to the award results in a judgment which is enforceable like any other judgment.

Before a lawsuit is instituted, the problem will have been carefully analyzed by the attorney. Only after attempts at negotiation and settlement have failed do the parties seek resolution of the dispute by litigation. It should be noted that estimates indicate that in excess of ninety percent of potential lawsuits are settled before suit is instituted, and probably ninety percent of the lawsuits that are brought are resolved before or during trial.

The lawsuit has four distinct phases, and each phase has several components. Phase one consists of the drafting and service of the summons and complaint by the person who is suing and the answer, or response, to the complaint by the person sued. Phase two consists of trial preparation and includes the drafting and filing of preliminary motions and the use of disclosure procedures. Phase three is the trial itself, which occurs before a judge or a jury. The fourth phase is the appeals process.

This paper will attempt to serve as a guide, highlighting various technical and procedural procedures encountered in civil litigation. The purpose is to promote understanding of the complexities of a lawsuit with explanations as to why the lawsuit seems protracted and never ending.

SUMMONS, COMPLAINT AND ANSWER

Summons

An action or lawsuit is commenced and jurisdiction is acquired by service of a summons. Some special proceedings that are in the nature of lawsuits are begun and jurisdiction acquired by the service of a notice of petition or order to show cause. The person who brings the action is referred to as the plaintiff (or petitioner) while the person that is sued is referred to as the defendant (or respondent).

A summons is a notice to the defendant that an action against him or her has been instituted by the plaintiff and that judgment will be taken against the defendant if he or she fails to answer the summons. The summons can be served without a complaint and its form and method of service, be it personal service or substituted service, is dictated by the court.

A pleading is the process performed by the parties to a lawsuit or action in alternately presenting written statements of their contention, each responsive to that which precedes, and each serving to narrow the field of controversy, until there evolves the issue or issues affirmed on one side and denied on the other, upon which the parties can then proceed to trial.

Complaint

The complaint (or petition) is drafted by the plaintiff and served on the defendant. The purpose of the complaint is to inform the defendant of all the material facts on which the plaintiff relies to support the cause of action.

The complaint spells out the title of the cause of action, specifying the name of the court in which the action has been brought, the name of the county in which the trial is required to be had and the names of the parties to the action, the plaintiff(s) and defendant(s). It contains a plain and concise statement of the facts constituting a cause of action without necessary repetition. Each material allegation is usually numbered. Much of the language used may be said to be in confusing "legalese" and in words that may inflame the layperson, such as fraud, misrepresentation and intentional. In reality these terms are often words of art that lawyers use regularly to express situations that are idiomatic or peculiar to the legal profession.

The complaint ends with the demand of the relief sought by the plaintiff. If recovery of money is demanded, the amount is stated.

Answer

Once the defendant has been served with the summons (which usually accompanies the complaint), the defendant must answer the summons and complaint within a prescribed period. The answer is a formal written statement made by the defendant setting forth the grounds of the defense. At this time a counterclaim may also be interposed. The counterclaim is a claim set forth by the defendant in opposition to or in deduction from the claim of the plaintiff. The plaintiff in turn responds to the counterclaim (which in effect is a complaint) with a reply. The answer may include a set-off or recoupment.

A set-off is a counter demand which the defendant holds against the plaintiff arising out of a transaction outside of the plaintiff's cause of action. A recoupment is keeping back something which is due because there is an equitable reason to withhoid it; and it is now often used as synonymous with "reduction," and may be confined to matters arising out of the same transaction upon which suit is brought. *(Black's Law Dictionary,* Fourth Edition, 1951).

There is no need to dwell on the fact that the initial stage of the lawsuit sets the tone for long periods of time spent, not only in drafting and responding to pleadings, but also for continuances and extensions of time for responding to the various pleadings. The delay devices are monitored by court rules that prescribe certain time limitations.

TRIAL PREPARATION

Motions

A motion is a request to the court to require the adversary lawyer to do something, or not to do something, in furtherance of the case. They are also used to make or preserve a record for appeal. Most commonly, motions are made prior to the trial in preparation of the case for trial. Again, while information, technical requests, strategy and at times, delay, are not just the objectives of filing a motion, they are important aspects of litigation. It is important for the lawyers to avail themselves of motion practice. The delay, whether connived or real, may irritate the parties to the action. The parties, therefore, should understand the reasons for motion practice and its part in the lawsuit. These pre-trial or preliminary motions are too numerous to list in their entirety, but a few important types will be discussed.

Motion to Dismiss. The motion to dismiss may be made by the defendant, and is usually made prior to filing the formal answer. This motion seeks to dismiss the complaint of the plaintiff for one of the following basic reasons: the court has no jurisdiction over the person or subject-matter; there is an action pending; there is no cause of action spelled out in the complaint; or the defendant is not a proper party to the suit. If the defendant's motion is granted, the case is dismissed, in most instances without prejudice (the action can be reinstituted) rather than on the merits of the case, with prejudice (the case cannot be reinstituted). For example, section 41 (B) (3) of the Ohio Rules of Civil Procedure provides that a dismissal of an action except as provided in section 41 (B) (4) operates as an adjudication upon the merits unless the court in its order otherwise specifies. Section 41 (B) (4) states that a dismissal for lack of jurisdiction over the person or subject matter or failure to join a party shall operate as a failure otherwise than on the merits.

Motion for Summary Judgment. In practice, once issue is joined (an answer filed by the defendent) some attorneys will file a motion for summary judgment. If plaintiff can prove by affidavits, documents, depositions, exhibits, that the defendant's defense lacks merit, this motion is made. If granted, plaintiff obtains a "summary judgment," which means plaintiff wins the case without a trial, on the merits (with prejudice). The usual ground for filing this motion is that there is no trialable issue of fact and the case can be decided as a matter of law.

Motion for More Definite Statement. To obtain additional facts relative to the claim and limit the other side's proof, the defendant may make a motion for a more definite statement regarding the complaint. The gist is that the complaint is too vague and does not adequately give the defendant enough knowledge to formulate a defense.

Each motion requires research, gathering of evidence, and drafting prior to its submission for argument. This is time consuming, and fee-wise can be expensive.

Disclosure

The primary purpose of pre-trial disclosure is to collect evidence. A second purpose is to make sure that evidence is available at the trial or to preserve testimony of a witness. Other purposes include: the binding of a witness whereby the lawyer uses disclosure to commit a party to a particular set of facts or story; proving the lack of knowledge of a witness by establishing a witness's ignorance of a point; the ability to size up the person as a potential witness at the trial; confining the action to certain areas; evaluation of the opposite counsel; and the opportunity for settlement negotiations. (Goldman and Barthold, *Depositions and Other Disclosure,* Practicing Law Institute, 1966).

As with motion practice, the number of disclosure methods, devices and techniques are too many to list. A few will be discussed to show the need for disclosure and how it operates.

Oral Depositions. A common disclosure device is the oral deposition. Generally, the purpose of an oral deposition is to obtain from the opposing party or other witnesses important and relevant information and documents which the other side or witnesses possess or control and which the other party to the lawsuit should have in order to be fully prepared for trial. Testimony under oath is taken.

Interrogctories. Interrogatories are written questions asked of the other party to the lawsuit or witnesses, always under oath, that allow a broad area of inquiry. In all cases, both sides are allowed to examine each other quite freely as to all facts and circumstances relating to the respective claims and defenses of the parties.

Notice to Admit. This notice is a written request to the other party to admit to the truth and genuiness of a document, photograph or other piece of prospective evidence whose authenticity would otherwise need extensive proof at trial. Failure to respond is tantamount to the admission sought. Refusal to admit, if proven wrong at the trial, results in the refuser being responsible for expenses and attorneys' fees.

The description of these motions and disclosure devices should give some insight into the behind-the-scenes developments of a lawsuit. They should also allow understanding as to why they are employed and why they consume time that often appears to be undue delay, but in the long run is not.

THE TRIAL

A trial is a judicial examination, in accordance with the law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has jurisdiction over it. The trial can take place before a judge or can be before a jury in which the issues of fact are determined by the verdict of a jury duly selected, impaneled and sworn. (*Black's Law Dictionary*, Fourth Edition, 1951).

Methods of Obtaining Evidence for Trial

Notice to Produce. The document known as a "Notice to Produce" is just what its name implies. The attorney serves upon his opponent a notice which requires the opponent to produce at the trial certain letters or documents which are in the possession of the opponent and which have an immediate bearing upon the case. If they are not produced at the trial, and no valid reason is offered for failing to produce them, the attorney who served the Notice to Produce will be permitted to offer "secondary evidence" of the contents of such papers.

Subpoenas. There are two kinds of subpoenas: (1) the subpoena which requires the individual named in it to appear in person at the trial. This does not require the production of papers; and, (2) the subpoena *duces tecum* which requires the individual or corporation named to produce papers, documents or articles described in the subpoena.

The subpoena is a powerful instrument, available to both sides of the litigation. A subpoena must be served personally upon the one subpoenaed, and the person subpoenaed must be paid the statutory fees. Failure to respond to a subpoena may be punished by contempt of court.

Trial Memoranda

The purpose of a trial memorandum is to bring to the attention of the court the applicable statutes and decisions of the courts in other cases, together with legal reasoning in support of the contention of the side represented. It is well researched and drafted and takes time in its preparation.

A Description of the Trial

If the trial is to take place before a jury, the first step is the process of the jury selection. Whether with a jury or to a judge, the trial then proceeds with an opening statement by the attorney representing the plaintiff, which is usually followed by an opening statement by the attorney representing the defendant. The opening statement contains a brief description of the nature of the action, the issues involved, a statement of the facts and indicates in a general way how the proof will sustain the allegations. (Jox, *Lawyer's Concise Guide to Trial Procedure*, Prentice-Hall, 1965).

Following the opening statements, the plaintiff attempts to prove a cause of action through the examination of witnesses and the introduction of evidence and exhibits. This is first accomplished by the direct examination of the witnesses by the attorney representing the plaintiff. After the plaintiff's attorney has completed the direct examination of each witness, the defendant's attorney may cross-examine the witness. When this part of the trial is completed, the plaintiff "rests." If the plaintiff has succeeded in proving a cause of action (prima facie case), the trial continues with the defendant proving a defense. The attorney for the defendant conducts the direct examination of each witness, followed by the cross-examination of each witness by plaintiff's attorney. The defendant then "rests."

Traditional motions, such as a motion for a directed verdict, are made. These motions are usually denied by the judge and the trial proceeds to the closing arguments, made by each attorney in turn. The closing statement generally contains development of the theory of the case as presented in the opening statement, a discussion of the principal issues, a statement of facts as developed by the testimony and exhibits and a request for a favorable verdict. (Jox, *supra.)*

Following the closing arguments is the judge's instruction to the jury as to the applicable law in the case. After the instructions are given to the jury, the jury then deliberates until it reaches a verdict. If there is not a jury, than the judge decides the case.

Judgment and Enforcement

A judgment is the final decision of the trial court. It follows a decision in favor of one of the parties and is entered on the court records as the controlling edict.

A judgment is a paper prepared by the winning side which says either that one party to the litigation has the right to recover from the other party a sum of money and statutory costs, or that one side has lost the case to the other side and cannot recover any money and must pay the costs; or, in a case which does not involve money, it may say that one side is required to do or not to do something with respect to the other side.

The judgment is enforceable by an execution. The execution is a paper that directs a sheriff or marshal to take into his custody (levy) and sell at public auction the property of the judgment debtor in payment of the judgment. It is also possible to execute (garnishment) on the salary or bank account of the judgment debtor.

With the conclusion of the trial, there is a winner and a loser. If the loser is not satisfied with the outcome of the trial, and is of the opinion that as a matter of law the trial court's decision should be reversed, then the next and final phase of the lawsuit, and a costly one, fee-wise, is embarked upon.

APPEALS

The law permits every judgment to be appealed by the losing party. This appeal is addressed to an appellate court which is different than a trial court and is a court of "higher" jurisdiction. The appeal arguments are submitted to the court in the form of written briefs followed by oral arguments before a panel of appellate justices. Pending appeal it is possible to stay (suspend) the operation of the judgment until the disposition of the appeal. The appeal is taken by the service of a Notice of Appeal on the other side with the time prescribed by law (usually thirty days). The appeals procedure is specific and dictated by the rules of the appeals or supreme court in each jurisdiction.

There must be a preparing of the record on appeal and the filing of the record and of detailed briefs and other documents with the appeals court. Appeals are heard before a panel of judges on the Appellant's Brief (one who appeals) and the Respondent's or Appellee's Brief (one who is being appealed). Counsel for each side within a time limitation argues the case for the respective parties. The arguments are strictly on points of law as submitted in the briefs. There are no witnesses. The appeals court is not a trial court but a court constituted to review any errors of the trial court that may have been prejudicial.

The description of the lawsuit from inception to appeal presented is brief. It takes volumes to describe in complete detail each component of the trial. However, this paper was not prepared to be a "nutshell" course in trial practice, but rather to aid persons that are present or potential parties to a suit and persons who are in a position to advise colleagues and staffs of the complexities, delays and procedures of the lawsuit

VI

COMPLIANCE WITH FEDERAL LEGISLATION RELATING TO DISCRIMINATION ON THE BASIS OF SEX AND RACE

Janet L. Wallin

Nearly every issue of the *Chronicle of Higher Education* carries an article, letter or editorial from an academician deploring the intrusion of the Federal government in the governance of higher education. Nearly every issue also carries an article or letter from an organization representing women and minority group members deploring the lack of enforcement of the Federal laws and regulations, and the lack of meaningful progress in employment of women and minority group members on the faculties of institutions of higher education.

Robert M. O'Neill has described the two types of pressures which have been operative during the past decade and which have contributed to the unprecedented governmental regulation of higher education.

> The internal pressure has been for greater governmental support to the private colleges and universities, many of which have been faced with near financial crisis as a result of rising costs, dwindling enrollments, and uncertain private support in the 1970's. From outside higher education, about the same time, has come much political pressure for greater accountability of higher education in regard to race and sex. Even where overt discrimination has not been practiced, women and minorities have been dramatically underrepresented in graduate and professional student bodies, on faculties and professional staffs.

> Since few institutions of higher learning voluntarily undertook to correct the situation in the 1960's, governmental mandates for affirmative action became inevitable in the '70s.[1]

This paper will briefly review the Federal laws and regulations concerning race and sex discrimination in educational institutions and some recent developments in the courts relating to them.

EQUAL PAY ACT OF 1963, AS AMENDED

The first Federal law prohibiting sex discrimination in employment is the Equal Pay Act of 1963, as amended by the Education Amendments of 1972.[2] Non-professional employees of colleges and universities have been covered since the effective date of the Act; professional and faculty employees have been covered since July 1, 1972. The Act prohibits discrimination on the basis of sex in the rate of pay for "equal work" requiring "equal skill, effort and responsibility" "performed under similar working conditions." The Act provides:

> No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures

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[1] O'Neill, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 Cin. L. Rev. 525, 527 (1975).

[2] Equal Pay Act of 1963, as amended by Section 906(b)(1) of the Education Amendments of 1972, 29 U.S.C. § 206 (d) (Supp II. 1972).

> earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *provided*, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of an employee.

The Equal Pay Act is administered and enforced by the Wage and Hour Division of the Department of Labor. There is no formal complaint procedure; complaints may be submitted informally by telephone or during a personal interview.

Furthermore, the name of the complaining party is not disclosed to the employer, unless the complainant consents to such disclosure. Investigation of the complaint will usually require examination of all wage records of all employees in similar levels of employment. This broad investigation is necessary not only to maintain the confidentiality of the name of the complainant, but also because the complaint will be treated as a class complaint, on behalf of all similarly situated employees.

If a violation of the Equal Pay Act is found to exist, the employer will be ordered to raise the pay of all affected employees, not merely the complaining party, and to give backpay awards up to two years for a non-willful violation, up to three years for a willful violation. The employer may *not* reduce the wages of any employee in order to equalize the pay rates.

Since the inception of the Act, "equal skill, effort and responsibility" has been interpreted to mean comparable or substantially similar, not identical. The Department of Labor, in its Interpretative Bulletin, has stated.

> Congress did not intend that inconsequential differences in a job content would be a valid excuse for payment of a lower wage to an employee of one

> sex than to an employee of the opposite sex if the two are performing equal work on essentially the same job in the same establishment.[3]

These criteria are relatively easy to apply to sales personnel, custodial employees, clerical workers and assembly line workers. They become more difficult to apply with the extension of the Equal Pay Act to professional employees, particularly in the academic setting.

Faculty members are generally hired and paid on the basis of special skills regarded as essential by colleges and universities to maintain scholastic excellence. As long as these skills are clearly and explicitly articulated and applied in a non-discriminatory fashion, variations in salary based on variations of these skills may meet the requirements of the Act.

Application of the Equal Pay Act becomes more difficult in the consideration of interdepartmental variations of salaries. At most colleges and universities these variations are wide, and generally reflect differences in market conditions outside of the institution. Faculty members are not interchangeable from one discipline to another. The peer review process of judging the individual's merit further complicates the application of pure, non-subjective criteria.

Nevertheless, when the statistical evidence demonstrates that all members of one sex in all departments of a college or university at all ranks are paid less than all members of the other sex in the same department at the same rank, a clear case of violation of the Equal Pay Act will be made.

The Department of Labor has not yet issued guidelines specifically for educational institutions. College and university administrators must, in the meantime, assure that intradepartmental differences in salaries are based on objective, explicit criteria, not on sex.

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[3] *Equal Pay for Equal Work Under the Fair Labor Standards Act - Interpretative Bulletin,* 29 C.F.R. Part 800 (1976).

TITLE VI OF THE 1964 CIVIL RIGHTS ACT

Title VI of the 1964 Civil Rights Act[4] prohibits discrimination against students of educational institutions on the basis of race, color, or national origin; it applies to all educational institutions receiving federal funds by way of grants, loans or contracts. It is administered by the Office for Civil Rights of the Department of Health, Education and Welfare and has been an important enforcement mechanism in school desegregation cases.

TITLE VII OF THE 1964 CIVIL RIGHTS ACT, AS AMENDED

Title VII of the 1964 Civil Rights Act, as amended by the Equal Employment Opportunity Act of 1972,[5] prohibits discrimination in employment practices on the basis of race, color, religion, sex or national origin. The Act is enforced by the Equal Employment Opportunity Commission; its powers were expanded by the 1972 amendments. The coverage of the Act also was expanded to include employees of state and municipal governments and educational institutions, a large segment of the workforce previously excluded.

On March 24, 1972, therefore, colleges and universities were met with requirements to comply with a full-blown enforcement mechanism and body of regulations and administrative and court decisions which had been developed during the period from 1964 to 1972.

Title VII defines an unlawful employment practice as any which:

(1) results in a failure or refusal to hire any individual, or

(2) results in the discharge of any individual, or

(3) differentiates between individuals with respect to compensation, terms, conditions or privileges of employment, or

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[4] 42 U.S. C.§§ 2000d to 2000d-6 (1970).

[5] 42 U.S.C. § 2000e et seq., as amended (Supp II. 1972).

(4) limits, segregates, or classifies employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect such person's employment status because of such person's race, color, religion, sex or national origin.

The law provides for receipt of complaints, review, investigation, attempted conciliation, and ultimate enforcement through the courts by the Equal Employment Opportunity Commission. In states in which an appropriate state agency exists, the EEOC will refer the complaint to the state agency for investigation and review. If the complaint has not been settled to the satisfaction of the complaining party within 180 days after the filing of the complaint, the complainant may request and receive a "right-to-sue" letter from the EEOC, a prerequisite for filing a private action in federal court under Title VII. With a backlog of more than 2,000 cases and a time backlog of from two to three years, the private action is frequently resorted to by complainants.

In a Title VII action, it is not necessary to prove that discrimination was overt, deliberate or motivated by maliciousness. The Supreme Court held, in the landmark decision of *Griggs v. Duke Power Co.*,[6] that any employment practice which had an adverse effect on any member of a protected class would constitute an unlawful employment practice under Title VII. In this case, the employer had required high school diplomas and an intelligence test for entry-level unskilled employees; the court held that these requirements were not related to the job requirements and had had an adverse effect on black applicants for employment.

Similarly, hiring practices which rely on word-of-mouth referral, although facially neutral and non-discriminatory, may be held to be discriminatory if they perpetuate a predominantly white male workforce.[7]

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[6] 401 U.S. 424 (1971).

In Title VII litigation, an individual need only establish a *prima facie* case of discrimination; the burden then shifts to the employer to prove that the particular practices either are non-discriminatory, or are justified by business necessity. The burden then shifts back to the plaintiff to show that these alleged non-discriminatory reasons were a pretext for discrimination.[8]

Statistics may be useful to a litigant in establishing a *prima facie* case of discrimination in hiring practices, promotion practices, or in salaries; the cumulative effect of these practices may show a "pattern" of discrimination against female or minority group employees.

Decisions of the EEOC and the courts have made it clear that educational institutions must also base their salaries and hiring and promotion decisions on objective, job-related criteria. The courts appear to be granting considerable latitude to colleges and universities in the exercise of professional judgment in promotion and retention cases.

In *Green v. Board of Regents,*[9] the plaintiff alleged sex discrimination in the failure of Texas Tech University to promote her to the rank of full professor after twenty-five years. The criteria which the University had used (teaching ability, publications and service to the university and community), and the process of review were approved by the District Court, which held:

> Promotion to the status of full professor cannot be merited solely by longevity and the numerical accumulation of advanced degrees and written works. The factors to be considered are not

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[7] *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970).

[8] *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973).

[9] 335 F. Supp. 249, aff'd 474 F. 2d 594 (5th Cir. 1973).

> susceptible of quantitative measurement, but must be weighed qualitatively in accordance with established guidelines.[10]

In *Faro v. New York University,*[11] the court said:

> Of all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a university level are probably least suited for federal court supervision.[12]

The EEOC appears not to be as reluctant to invade the prerogatives of academe; in one decision it characterized criteria for promotion as "highly subjective" and "amorphous."[13]

In another decision, the EEOC found reasonable cause for discrimination to exist in the denial of tenure to a female faculty member, based on the totality of the circumstances. In spite of documented complaints from students and fellow faculty members about her inability to work well with others, the EEOC found that wage discrimination between male and female faculty members existed on a widespread basis. The Commission held that the "entire process of determining who shall or shall not be reappointed is accomplished in a highly subjective, essentially non-reviewable manner."[14]

Colleges and universities cannot assume that all courts will be reluctant to "invade and take over" their decisions relating to salaries, hiring, promotion and retention practices. Criteria should be as explicit as possible, should be clearly job-related, and the reviewing process should provide adequate reasons for any negative decisions. If wide discrepancies exist between salaries and rate of promotion of white males and females and minority group members, a

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[10] *Id.* at 251.

[11] 502 F. 2d 1229 (2d Cir. 1974).

[12] *Id.* at 1231.

[13] EEOC Decision 74-53 (Nov. 12, 1973), 7 F.E.P. Cas 461.

[14] EEOC Decision 74-15 (Aug. 7, 1973), 6 F.E.P. Cas. 1011.

prima facie case of discrimination under Title VII may exist.

College and university administrators should be guided by the perceptive advice offered by George P. Sape in his analysis of the effect of Title VII on educational institutions:

> . . . Educational institutions, in the eyes of the law, are viewed merely as employers, not unlike those employers who have traditionally been subject to the provisions of the act. Title VII, therefore, approaches a college and university not with any special feeling, like that of an alumnus returning to savor the memories of an earlier era, but rather like a technician who must correct a faulty system which is holding back the full operation of a larger unit. In this case, employment discrimination in the college or university setting is the same as employment discrimination on the assembly line, or in the executive suite of any major corporation, and must be dealt with in the same manner. The root problems are the same ones that have plagued other businesses and other employers, the conditions which have led to these problems are the same, and the solutions cannot be far different.[15]

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Title IX of the Education Amendments of 1972, as amended,[16] prohibits discrimination on the basis of sex against any person under any education program or activity receiving federal assistance. Educational institutions at all levels are included, but there are some specific exemptions from the act. Religious institutions are exempt insofar as the law would not be consistent with the religious tenets of the organization. Undergraduate institutions which have always been single-sex institutions are exempt as to admissions. Social fraternities and sororities and organizations such as the Boy Scouts, the Girl Scouts, the YMCA and the YWCA are exempt as to their membership practices.

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[15] Sape, *Title VII of the Civil Rights Act of 1964, as amended,* in Federal Regulations and the Employment Practices of Colleges and Universities, EEO-1 at 22 (Jan, 30, 1976). [This manual is published by the National Association of College and University Business Officers, One Dupont Circle, Washington, D. C. 20036. It is an excellent manual, and is available at modest cost. I recommend it to every college and university administrator.]

[16] 20 U.S.C. §§ 1681-1686, as amended (Supp. IV 1974).

After adoption of Title IX, the Department of Health, Education and Welfare spent two years drafting regulations for its implementation. HEW received nearly 10,000 responses to its draft regulations, and thereafter revised some of the regulations. After a 45-day period for review by Congress, the regulations became effective on July 21, 1975.[17]

Intense lobbying by women's organizations and by representatives of intercollegiate athletic programs accompanied the review by Congress, but no changes were adopted.

The regulations include detailed examples of practices which are permissible and impermissible under Title IX.

By July 21, 1976, each institution had to have evaluated its policies and procedures and modified those which violated the regulations. Secondary and post-secondary institutions were given an additional two-year period within which to bring all of their athletic programs into conformity with the regulations. A statement of policy of non-discrimination is to be prominently contained in every bulletin, catalog or application form. Each educational institution should designate at least one employee responsible for carrying out the regulations, and grievance procedures should be established. This information should be disseminated to each student and employee of the institution.

The following summary of the regulations was published by the Office for Civil Rights in June, 1975 in an *HEW Fact Sheet:*

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17. 45 C.F.R. Part 86 (1975).

ADMISSIONS

The final regulation covers *recruitment as well as all admissions policies and practices* of those recipients *not exempt as to admissions.* It includes specific prohibitions of sex discrimination through separate ranking of applicants, application of sex-based quotas, administration of sex-biased tests or selection criteria, and granting of preference to applicants based on their attendance at particular institutions if the preference results in sex discrimination. The final regulation also forbids application in a discriminatory manner of rules concerning marital or parental status, and prohibits discrimination on the basis of pregnancy and related conditions, providing that recipients shall treat pregnancy and disabilities related to pregnancy in the same way as any other temporary disability or physical condition.

Generally, *comparable efforts* must be made by recipients *to recruit* members of each sex. Where discrimination previously existed, *additional recruitment efforts* directed primarily toward members of one sex *must be undertaken to remedy the effects of the past discrimination.*

TREATMENT

As stated before, although some schools are exempt from Title IX with regard to admissions, *all* schools must *treat* their admitted students *without discrimination* on the basis of sex. With regard to treatment of students, therefore, the final regulation applies to recipient pre-schools, elementary and secondary schools, vocational schools, colleges, and universitties at the undergraduate, graduate and professional levels, as well as to other agencies, organizations and persons which receive

Federal funds for educational programs and activities.

Specifically, the treatment sections of the regulation cover the following areas:

(1) Access to and participation in course offerings and extracurricular activities, including campus organizations and competitive athletics;

(2) Eligibility for and receipt or enjoyment of benefits, services, and financial aid;

(3) Use of facilities, and comparability of, availability of, and rules concerning housing (except that single-sex housing is permissible).

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Classes in health education, if offered, may not be conducted separately on the basis of sex, but the final regulation allows separate sessions for boys and girls at the elementary and secondary school level during times when the materials and discussion deal exclusively with human sexuality. There is, of course, nothing in the law or the final regulation requiring schools to conduct sex education classes. This is a matter for local determination.

Physical Education

While generally prohibiting sex segrated physical education classes, the final regulations *do* allow separation by sex in physical education classes during competition in wrestling, boxing, basketball, football, and other sports involving bodily contact. Schools must comply fully with the regulation with respect to physical education as soon as possible. In the case of physical education classes elementary schools must be in full compliance no later than one year from the effective date of the regulation. In the case of physical education classes at the secondary and postsecondary level, schools must be in compliance no later than three years from the effective date of the regulation. During these periods, while making necessary adjustments, any physical education classes or activities which are separate, must be comparable for each sex.

Athletics

Where selection is based on *competitive skill* or the activity involved is a *contact* sport, athletics *may* be provided through *separate* teams for males and females or through a single team open to both sexes. If separate teams are offered, a recipient institution may not discriminate on the basis of sex in provision of necessary equipment or supplies, or in any other way, *but equal aggregate expenditures are not required.* The goal of the final regulation in the area of athletics is to secure equal opportunity for males and females while allowing schools and colleges flexibility in determining how best to provide such opportunity.

In determining whether equal opportunities are available, such factors as these will be considered:

—whether the sports selected reflect the interests and abilities of both sexes;

—provision of supplies and equipment;

—game and practice schedules;

—travel and per diem allowances;

—coaching and academic tutoring opportunities and the assignment and pay of the coaches and tutors;

—locker rooms, practice and competitive facilities;

—medical and training services;

—housing and dining facilities and services;

—publicity.

Where a team in a non-contact sport, the membership of which is based on skill, is offered for members of one sex and not for members of the other sex, and athletic opportunities for the sex for whom no team is available have previously been limited, individuals of that sex must be allowed to compete for the team offered. For example, if tennis is offered for men and not for women and a woman wishes to play on the tennis team, if women's sports have previously been limited at the institution in question, that woman may compete for a place on the men's team. However, this provision does not alter the responsibility which a recipient has with regard to the provision of equal opportunity. Recipients are requested to 'select sports and levels of competition which effectively accommodate the interests and abilities of members of both sexes.' Thus, an institution would be required to provide separate teams for men and women, in situations where the provision of only one team would not 'accommodate the interests and abilities of members of both sexes.' This provision applies whether sports are contact or noncontact.

In the case of athletics, like physical education, elementary schools will have up to a year from the effective date of the regulations to comply, and secondary and postsecondary schools will have up to three years.

Organizations

Generally, a recipient may not, in connection with its education program or activity, provide significant assistance to any organization, agency or person which discriminates on the basis of sex. Such forms of assistance to discriminatory groups as faculty sponsors, facilities, administrative staff, etc., may, on a case-by-case basis, be determined to be significant enough to render the organization subject to the non-discrimination requirements of the regulation. As noted, previously, the final regulation incorporates an exemption for the membership practices of social fraternities and sororities at the postsecondary level, the Boy Scouts, Girl Scouts, Campfire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth service organizations. However, recipients continue to be prohibited from providing significant assistance to professional or honorary fraternal organizations.

Benefits, Services, and Financial Aid

Generally, a recipient subject to the regulation is prohibited from discriminating in making available, in connection with its educational program or activity, any benefits, services, or financial aid although 'pooling' of certain sex-restrictive scholarships is permitted. Benefits and services include medical and insurance policies and services for students, counseling, and assistance in obtaining employment. Financial aid includes scholarships, loans, grants-in-aid and work-study programs.

Facilities

Generally, all facilities must be available without discrimination on the basis of sex. As provided in the statute, however, *the regulation permits separate housing based on sex as well as separate locker rooms, toilets and showers.* A recipient may not make available to members of one sex locker rooms, toilets and showers which are not comparable to those provided to members of the other sex. With respect to housing, the regulation requires comparability as to the facilities themselves and non-discrimination as to their availability and as to the rules under which they are operated, including fees, hours, and requirements for off-campus housing.

Curricular Materials

The final regulation includes a provision which states that 'nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.' As noted in the Preamble to the final regulation, the Department recognizes that sex stereotyping in curricula is a serious matter, but notes that the imposition of restrictions in this area would inevitably limit communication and would thrust the Department into the role of Federal censor. The Department assumes that recipients will deal with this problem in the exercise of their general authority and control over curricula and course content. For its part, the Department will increase its efforts, through the Office of Education, to provide research, assistance, and guidance to local educational agencies in eliminating sex bias from curricula and educational material.

EXAMPLES—TREATMENT

—A recipient school district may not require boys to take shop and girls to take home economics, exclude girls from shop and boys from hone economics, or operate separate home economics or shop classes for boys and girls.

—A recipient vocational or other educational institution may not state in its catalog or elsewhere that a course is solely or primarily for persons of one sex.

—Male and female students shall not be discriminated against on the basis of sex in counseling. Generally, a counselor may not use different materials in testing or guidance based on the student's sex unless this is essential in eliminating bias and then, provided the materials cover the same occupations and interest areas. Also, if a school finds that a class contains a disproportionate number of students of one sex, it must be sure that this disproproption is not the result of sex-biased counseling or materials.

—A recipient school district may not require segregation of boys into one health, physical education, or other class, and segregation of girls into other such class.

—Where men are afforded opportunities for athletic scholarships, the final regulation requires that women also be afforded these opportunities.

Specifically, the regulation provides: 'To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.'

—Locker rooms, showers, and other facilities provided for women must be comparable to those provided for men.

—A recipient educational institution would be *prohibited from providing financial support* for an all-female hiking club, an all-male language club, or a single-sex honorary society. *However, a non-exempt organization whose membership was restricted* to members of one sex *could adhere to its restrictive policies,* and operate on the campus of a recipient university, *if it received no assistance from the university.*

—Male and female students must be eligible for benefits, services and financial aid without discrimination on the basis of sex. Where colleges administer scholarships designated exclusively for one sex or the other, the scholarship recipients should initially be chosen without regard to sex. Then when the time comes to award the money, sex may be taken into consideration in matching available monies to the students chosen. No person may be denied financial aid merely because no aid for his or her sex is available. Prizes, awards and scholarships not established under a will or trust must be administered without regard to sex.

—An institution which has one swimming pool *must* provide for use by members of both sexes on a non-discriminatory basis.

—An institution which lists off-campus housing for its students *must ensure* that, *in the aggregate, comparable off-campus housing is available in equal proportion to those members of each sex expressing an interest in it.*

—Administration by a recipient institution of different rules based on sex regarding eligibility for living off-campus, curfews, availability of cleaning and janitorial assistance, etc. would violate the regulation.

EMPLOYMENT

All employees in *all* institutions are covered, both full-and part-time, except those in military schools, and in religious schools, to the extent compliance would be inconsistent with the controlling religious tenets. Employment coverage under the proposed regulation generally follows the policies of the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance. Specifically, the proposal covers:

(a) employment criteria

(b) recruitment

(c) compensation

(d) job classification and structure

(e) fringe benefits

(f) marital or parental status

(g) effect of state or local law or other requirements

(h) advertising

(i) pre-employment inquiries

(j) sex as a *bona fide* occupational qualification.

As to fringe benefits, employers must provide either equal contributions to or equal benefits under pension plans for male and female employees; as to pregnancy, leave and fringe benefits to pregnant employees must be offered in the same manner as are leave and benefits to temporarily disabled employees.

EXAMPLES—EMPLOYMENT

—A recipient employer may not recruit and hire employees solely from discriminatory sources in connection with its educational program or activity.

—A recipient employer must provide *equal* pay to male and female employees performing the *same work* in connection with its educational program or activity.

—A recipient employer may not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy or related conditions.

ENFORCEMENT PROCEDURE

The final regulation incorporates by reference a procedural section which includes among other things, compliance reviews, access to information, administrative termination procedure (hearings), decision, administrative and judicial review and post-termination proceedings.

Should a violation of the statute occur, the Department is obligated to seek voluntary compliance. If attempts to secure voluntary compliance fail, enforcement action may be taken:

(1) by administrative proceedings to terminate Federal financial assistance until the institution ceases its discriminatory conduct; or

(2) by other means authorized by law, including referral of the matter to the Department of Justice with a recommendation for initiation of court proceedings. Under the latter mode of enforcement, the recipient's Federal funds are not jeopardized.

In its interpretation of its enforcement power, HEW has taken the position that Title IX applies to each education program or activity which receives or *benefits* from Federal financial assistance, and that they may regulate athletic programs which do not receive direct Federal funding.

The introduction to the regulations explains this interpretation:

> . . . Under analogous cases involving racial discrimination, the courts have held that the education functions of a school district or college include any service, facility, activity or program which it operates or sponsors, including athletics and other extra curricular activities. These precedents have been followed with regard to sex discrimination . . .
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> * * * * * * * *
>
> Title IX requires in 20 U.S. C. 1682 that termination or refusal to grant or continue such assistance 'shall be limited in its effect to the particular education program or activity or part thereof in which noncompliance has been found.' The interpretation of this provision in Title IX will be consistent with the interpretation of similar language contained in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1). Therefore, an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance. This interpretation is consistent with the only case specifically ruling on the language contained in Title VI, which holds that Federal funds may be terminated under Title VI upon a finding that they 'are infected by a discriminatory environment * * * ' *Board of Public Instruction of Taylor County,*

> *Florida* v. *Finch,* 414 F. 2d 1068, 1078-79 (5th Cir. 1969).[18] 1068, 1078-79 (5th Cir. 1969).[18]

The National Collegiate Athletic Association filed suit in March, 1976 to enjoin HEW from enforcing its regulations, or at least the portions which deal with athletics.

Their challenge to the regulations is based on the following contentions:

> That athletics do not receive direct Federal aid and thus should not be included under the coverage of the law.
>
> That the department unlawfully interpreted the law to include programs that 'benefit from' federal aid, while the law itself only mentions programs that 'receive aid.'[19]

Whatever the ultimate resolution of this issue may be, it would appear that HEW has *not* exceeded its delegated authority in interpreting Title IX. In Section 844 of the Education Amendments of 1974, Congress specifically directed HEW to prepare and publish. " . . . proposed regulations implementing the provisions of Title IX . . . relating to the prohibition of sex discrimination in Federally-assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."[20]

Furthermore, Congress approved the final regulations which had been "laid before it" for a 45-day review period. These regulations may, therefore, have the force of law rather than merely being entitled to "deference" as guidance to courts and litigants.

EXECUTIVE ORDER 11246, AS AMENDED

Executive Order 11246, as amended, applies to employers including educational institutions with Government contracts in excess of $10,000. The Executive Order prohibits discrimination in employment on the basis of race, color, religion, sex or national origin, *and* requires contractors to take affirmative action to ensure that applicants are employed and that employees are treated without discrimination. The regulations issued by the Office of Federal Contract Compliance of the Department of Labor prescribe in detail the requirements of affirmative action plans.

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[18] 40 Fed. Reg. 24,128 (1975).

[19] 12 Chronicle of Higher Education 1 (March 1, 1976).

[20] P.L. 93-380, 88 Stat. 484 (1974).

Affirmative action requires employers to take certain steps beyond a neutral non-discriminatory position. The premise of affirmative action is that systemic discrimination exists in virtually every institution and that the effects of systemic discrimination will never be overcome unless additional affirmative efforts are made to identify, recruit, employ and promote qualified members of protected minority groups and females.

Employers are required to analyze their own work force, to identify areas of underutilization of women and minority group members, to develop a plan to overcome this underutilization including realistic goals and timetables for achieving the goals, and to make a good faith effort to achieve these goals.

The concept of affirmative action has become more controversial in the academic sector than in the private employment sector. "Affirmative action" has been converted (or subverted) to "reverse discrimination;" "goals" have been equated with "quotas;" the term "qualified" is largely ignored.

The following excerpts from the Higher Education Guidelines[21] explain the basic concept of Executive Order 11246 and illustrate its applicability to colleges and universities:

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[21] Free copies of *Higher Education Guidelines* may be obtained by writing to: Public Information Office, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C. 20201.

Who is Protected by the Executive Order

The *nondiscrimination* requirements of the Executive Order apply to *all* persons, whether or not the individual is a member of a conventionally defined "minority group." In other words, *no* person may be denied employment or related benefits on grounds of his or her race, color, religion, sex, or national origin.

The *affirmative action* requirements of determining underutilization, setting goals and timetables and taking related action as detailed in Revised Order No. 4 were designed to further employment opportunity for women and minorities.

Goals and Timetables

As a part of the affirmative action obligation, Revised Order No. 4 requires a contractor to determine whether women and minorities are "underutilized" in its employee work force and, if that is the case, to develop as a part of its affirmative action program specific goals and timetables designed to overcome that underutilization. Underutilization is defined in the regulations as "having fewer women or minorities in a particular job than would reasonably be expected by their availability."

Goals are projected levels of achievement resulting from an analysis by the contractor of its deficiencies, and of what it can reasonably do to remedy them, given the availability of qualified minorities and women and the expected turnover in its work force. Establishing goals should be coupled with the adoption of genuine and effective techniques and procedures to locate qualified members of groups which have previously been denied opportunities for employment or advancement and to eliminate obstacles within the structure and operation of the institution (e.g. discriminatory hiring or promotion standards) which have prevented members of certain groups from securing employment or advancement.

The achievement of goals is not the sole measurement of a contractor's compliance, but represents a primary threshold for determining a contractor's level of performance and whether an issue of compliance exists. If the contractor falls short of its goals at the end of the period it has set, that failure in itself does not require a conclusion of noncompliance. It does, however, require a determination by the contractor as to why the failure occurred. If the goals were not met because the number of employment openings was inaccurately estimated, or because of changed employment market conditions or the unavailability of women and minorities with the specific qualifications needed, but the record discloses that the contractor followed its affirmative action program, it has complied with the letter and spirit of the Executive Order. If, on the other hand, it appears that the cause for failure was an inattention to the nondiscrimination and affirmative action policies and procedures set by the contractor, then the contractor may be found out of compliance. It should be emphasized that while goals are required, quotas are neither required nor permitted by the Executive Order. When used correctly, goals are an indicator of probable compliance and achievement, not a rigid or exclusive measure of performance.

Nothing in the Executive Order requires that a university contractor eliminate or dilute standards which are necessary to the successful performance of the institution's educational and research functions.

The affirmative action concept does not require that a university employ or promote any persons who are unqualified. The concept does require, however, that any standards or criteria which have had the effect of excluding women and minorities be eliminated, unless the contractor can demonstrate that such criteria are conditions of successful performance in the particular position involved.

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Recruitment

Recruitment is the process by which an institution or department within an institution develops an applicant pool from which hiring decisions are made. Recruitment may be an active process, in which the institution seeks to communicate its employment needs to candidates through advertisement, word-of-mouth notification to graduate schools or other training programs, disciplinary conventions or job registers. Recruitment may also be the passive function of including in the applicant pool those persons who on their own initiative or by unsolicited recommendation apply to the institution for a position.

In both academic and nonacademic areas, universities must recruit women and minority persons as actively as they have recruited white males. Some universities, for example, have tended to recruit heavily at institutions graduating exclusively or predominantly non-minority males, and have failed to advertise in media which would reach the minority and female communities, or have relied upon personal contacts and friendships which have had the effect of excluding from consideration women and minority group persons.

In the academic area, the informality of word-of-mouth recruiting and its reliance on factors outside the knowledge or control of the university makes this method particularly susceptible to abuse. In addition, since women and minorities are often not in word-of-mouth channels of recruitment, their candidacies may not be advanced with the same frequency or strength of endorsement as they merit, and as their white male colleagues receive.

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Hiring

Once a nondiscriminatory applicant pool has been established through recruitment, the process of selection from that pool must also carefully follow procedures designed to ensure nondiscrimination. In all cases, standards and criteria for employment should be made reasonably explicit, and should be accessible to all employees and applicants. Such standards may not overtly draw a distinction based on race, sex, color, religion, or national origin, nor may they be applied inconsistently to deny equality of opportunity on these bases.

In hiring decisions, assignment to a particular title or rank may be discriminatory. For example, in many institutions women are more often assigned initially to lower academic ranks than are men. A study by one disciplinary association showed that women tend to be offered a first appointment at the rank of Instructor rather than the rank of Assistant Professor three times more often than men with identical qualifications. Where there is no valid basis for such differential treatment, such a practice is in violation of the Executive Order.

Recruiting and hiring decisions which are governed by unverified assumptions about a particular individual's willingness or ability to relocate because of his or her race or sex are in violation of the Executive Order. For example, university personnel responsible for employment decisions should not assume that a women will be unwilling to accept an offer because of her marital status, or that a minority person will be unwilling to live in a predominantly white community.

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In the area of academic appointments, a nondiscriminatory selection process does not mean that an institution should indulge in "reverse discrimination" or "preferential treatment" which leads to the selection of unqualified persons over qualified ones. Indeed, to take such action on grounds of race, ethnicity, sex or religion constitutes discrimination in violation of the Executive Order.

It should also be pointed out that nothing in the Executive Order requires or permits a contractor to fire, demote or displace persons on grounds of race, color, sex, religion, or national origin in order to fulfill the affirmative action concept of the Executive Order. Again, to do so would violate the Executive Order. Affirmative action goals are to be sought through recruitment and hiring for vacancies created by normal growth and attrition in existing positions.

Unfortunately, a number of university officials have chosen to explain dismissals, transfers, alterations of job descriptions, changes in promotion potential or fringe benefits, and refusals to hire *not* on the basis of merit or some objective sought by the university administration aside from the Executive Order, but on grounds that such actions and other "preferential treatment regardless of merit" are now required by Federal law. Such statements constitute either a misunderstanding of the law or a willful

> distortion of it. In either case, where they actually reflect decisions not to employ or promote on grounds of race, color, sex, religion or national origin, they constitute a violation of the Executive Order and other Federal laws.

CONCLUSION

The cloak of academic freedom has traditionally insulated faculty hiring and promotion practices from any examination of the criteria used for such decisions and the methods of applying criteria. There has, however, never been a rational justification for using this cloak to cover inherently unfair practices.

Federal laws and regulations prohibiting discrimination on the basis of race and sex require a thorough review by each college and university of its employment practices. This review should lead to adoption of criteria for decisions relating to hiring, promotion, salaries and tenure, and to documentation of the application of these criteria to each decision affecting a faculty member. All faculty members will be the beneficiaries of changes within the academic community requiring fairness and openness in employment practices.

Dr. Bernice Sandler, director of the project on the status and education of women of the Association of American Colleges, has summarized the controversy as eloquently as anyone. The following statement by Dr. Sandler captures both the tone and basic purposes of affirmative action legislation today and offers a fitting conclusion to this brief overview of law and regulations.

> Some administrators claim that an institution's autonomy is threatened by having numerical goals, and that academic freedom will be violated because they will be 'forced' to give 'preference' to unqualified women and minorities. Traditionally, academic freedom has meant the right to publish, to teach and

to work with controversial ideas. The aim of numerical goals is not to give preference, but to end perference, the existing preference for males, the existing preference for members of the 'old boy' club. Academia has traditionally operated with an unwritten, but functionally effective 'affirmative action' plan for white males. That preference system is now illegal. In one sense, the words 'academic freedom' have become a rallying cry and smokescreen to obscure basic issues. Some women's groups claim that they are analogous to the cry of 'states rights' and 'quality education.'

Academia has generally relied on the 'old boy' method of recruiting and hiring—the vast, informal network of old school chums, colleagues, drinking buddies, etc.—a network to which women and minorities rarely have had access. The merit system has always been a closed merit system, for large portions of the available qualified pool have been excluded. The government is not asking that the merit system be abolished, but only that it be opened up to a larger pool of qualified persons. To recruit in a different manner means additional work and effort, and more importantly, it means change. Change is never easy, particularly when it is perceived as a threat to the power base.

Some institutions mistakenly feel that they are now forced to hire women and minorities in order to 'get HEW off their back.' Decisions based on such a gross misinterpretatimn of the law are tragic. If institutions give preference to a less qualified woman or minority person over a better qualified white male, then such institutions are violating the very laws and regulations they are seeking to observe because such preferences are clearly prohibited by law. Institutions cannot discriminate against qualified members of any group based on race, color, religion, national origin or sex and this includes discrimination against white males.

What is not at stake is the hiring of lesser qualified persons or 'reverse discrimination' but rather a very real economic threat is present: for every woman or minority person that is hired, it means that one less white male is hired. If more women are paid commensurately with their positions then some men may get raises more slowly or perhaps not at all. It will be harder for qualified white males to get obs when they compete with qualified women or minorities, but it cannot be termed 'reverse discrimination.'

It is quite likely that universities, under numerical goals and affirmative action, will find that the quality of academic appointments will actually improve. Despite claims of an unbiased and 'glorious' objective merit system, academic judgements have too often been intuitive and subjective. Now, instead of being able to justify a candidate merely by saying 'he's a well known and respected scholar,' department heads will not only have to develop specific criteria, but will have to be able to demonstrate that the candidate is the very best person recruited from the largest pool possible, one which will include qualified women and minorities.[22]

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[22] Sandler, *Sex Discrimination, Educational Institutions, and the Law: A New Issue on Campus*, 2 J. of L.-Educ. 613, 619-620 (1973).